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In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Title X of the Public Health Service Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them for abortions, or engaging in abortion-related advocacy. The questions presented are the following:

1. Whether the regulations violate Title X.

2. Whether the regulations violate the Fifth Amendment right of a pregnant woman to terminate her pregnancy.

3. Whether the regulations violate the First Amendment rights of grantees and pregnant women.

4. Whether any invalid provisions of the regulations are severable from the remaining ones.

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Louis W. Sullivan, Secretary of Health and Human Services. Respondents, plaintiffs-appellees below, are the Commonwealth of Massachusetts, the National Family Planning and Reproductive Health Association, the American Public Health Association, the Family Planning Council of Western Massachusetts, Healthworks—a Family Life Resource Center, Action For Boston Community Development, Inc., Health Awareness Services of Central Massachusetts, Inc., Health Care of Southeastern Massachusetts, Inc., the California Family Planning Council, the Los Angeles Regional Family Planning Council, the Missouri Community Health Corporation, St. Louis Family Planning Council, Inc., the Family Planning Council of Southeastern Pennsylvania, Martin Friedfeld, Steven Sondheimer, and Mary Moe.

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COMMONWEALTH OF MASSACHUSETTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Louis W. Sullivan, Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-57a) is reported at 899 F.2d 53. The panel opinion of the court of appeals (App., *infra*, 58a-120a) is not officially reported. The opinion of the district court (App., *infra*, 121a-141a) is reported at 679 F. Supp. 137.

JURISDICTION

The judgment of the en banc court of appeals (App., *infra*, 144a) was entered on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the relevant constitutional, statutory, and regulatory provisions are reprinted in the appendix to this petition. App., *infra*, 145a *et seq.*

STATEMENT

1. Title X of the Public Health Service Act [1] authorizes the Secretary of Health and Human Services to make grants nationwide to public and private nonprofit entities to establish "projects" [2] that "shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. 300. Congress provided, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970).

2. The initial implementing regulations required that grantees "not provide abortions as a method of family

[1] Title X was added to the Public Health Service Act by the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1506-1508, 42 U.S.C. 300 to 300a-8 (1982 & Supp. V 1987).

[2] "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. Moreover, while Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic.

planning" in Title X programs. 42 C.F.R. 59.5(a)(9) (1972); see 36 Fed. Reg. 18,465 (1971); 45 Fed. Reg. 37,436 (1980). The statute was interpreted, however, to allow grantees to provide "non-directive counseling" about pregnancy termination, including information about and referral for abortions through the provision of the names, addresses, and telephone numbers of abortion providers.

In 1988, in order to bring the Title X program more in line with the text and purposes of 42 U.S.C. 300a-6, the Secretary adopted new regulations that altered the counseling and referral policy; the regulations also clarified pre-existing limitations on abortion-related advocacy and requirements of physical and financial separation from the performance of abortion-related activities. See 53 Fed. Reg. 2922, 2923-2925 (1988). The new regulations prohibit Title X projects from engaging in those activities that assist a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects. More specifically, the regulations attach three major conditions to the grant of federal funds for Title X projects.

First, a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Title X projects may not counsel their clients about abortion as a family planning method whether such counseling is neutral, favors, or opposes abortion. Nor may a Title X project assist women in procuring an abortion for family planning purposes by providing them with referrals to entities that provide abortions or abortion-related services as their principal business. 42 C.F.R. 59.8(a)(2). At the same time, the regulations do not forbid a Title X project from making clear to its clients that the project only provides preventive family

planning services and does not assist in procuring abortions and abortion-related services.

Second, the so-called "program-integrity" regulations clarify the required degree of physical and financial separation between Title X projects and abortion services, whether provided by the grantee or any other organization. The regulations call for a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9. There are no other restrictions in that section on the relationship between a grantee's Title X project and its other activities, or on the activities of parent or affiliate organizations.

Third, the regulations codify and clarify the preexisting prohibition on abortion advocacy, and give examples of activities so proscribed, such as lobbying and using legal action to make abortion available as a method of family planning.[3]

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[3] (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. 59.10(a).

The regulations' restrictions concern only abortion as a method of family planning. The regulations require a Title X project to refer a client for necessary treatment in a medical emergency, even if this treatment would normally involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2). But the principal focus of Title X's subsidies is "[f]amily planning," which is defined as "the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved." 42 C.F.R. 59.2. Thus, the medical services that Title X supports also do not include post-pregnancy services, such as prenatal and obstetric care. Accordingly, if a client of a Title X project is diagnosed as pregnant and no medical emergency is present, she must be referred to an entity that will offer prenatal pregnancy care.[4] The regulations do not attempt to constrict the information that a Title X client might receive at a prenatal care facility; the fact that a pregnant woman received counseling about abortion as a method of family planning at the prenatal care facility would not, in itself, violate the regulations. But a Title X project may not employ prenatal care referrals as a means of circumventing Title X's restrictions by "weighing the list of referrals in favor of health care providers which perform abortions, by including on the list * * * health care providers whose principal business is the provision of abortions, * * * or by 'steering' clients to providers who offer abortion as a method of family planning." 42 C.F.R. 59.8(a)(3).

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[4] The client must "be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." 42 C.F.R. 59.8(a)(2).

Moreover, the new regulations apply only to "the use of Title X project funds." 42 C.F.R. 59.10(a).[5] Any abortion-related services provided or activity engaged in by a grantee or its affiliates outside of its Title X project has no effect on the grantee's Title X funding.

3. After the regulations had been promulgated, but before they had been applied, respondents brought this action in the United States District Court for the District of Massachusetts, challenging the facial validity of the regulations on statutory and constitutional grounds. The district court invalidated the regulations on both statutory and constitutional grounds. App., *infra*, 121a-141a. The court held that, since the regulations changed past policy, the Secretary "must justify [his] action to a greater degree than when [he] first promulgates regulations." *Id.* at 127a. The court held that the regulations did not satisfy this heightened scrutiny. *Id.* at 128a-129a. The court also held that the regulations in part violated the First Amendment on the grounds that the conditions of eligibility penalized constitutionally protected speech and also discriminated on the basis of viewpoint. *Id.* at 136a-139a. Finally, the court held that the regulations placed "an impermissible burden on the presently recognized rights of a pregnant client of a Title X clinic" to have an abortion. *Id.* at 139a-140a.

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[5] Title X project funds are defined to include "grant funds, grant-related income or matching funds." Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of expenses. Grant-related funds are funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-generated income may be used. The Secretary may allow these funds to be used as matching funds; to be, in effect, returned to the government; or to be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e).

4. The court of appeals affirmed by a divided vote. App., *infra*, 58a-120a. The majority held that the regulations were within the Secretary's statutory authority under Title X with the exception of the so-called program integrity regulations, which the majority held invalid under the statute. App., *infra*, 63a-77a. But the majority held that the regulations' exclusion of counseling and referrals about abortion from the services subsidized by Title X "infringe[s] upon women's freedom of reproductive choice by denying them access to important information and interfering with the physician-patient relationship." App., *infra*, 85a. In addition, the majority held that prohibiting Title X grantees from using Title X program funds to engage in abortion-related advocacy is "content-based regulation" and an "attempt[ ] to limit public discussion on abortion rights," in violation of the First Amendment. App., *infra*, 93a, 94a.

Judge Torruella dissented in part. App., *infra*, 101a-120a. He agreed with the majority that the so-called program integrity provisions violated Title X. App., *infra*, 105a-106a. He also concluded that the matching fund provision in the regulations violated the First Amendment by improperly limiting the uses to which a Title X grantee could put private funds. App., *infra*, 107a-109a. Moreover, he would have held invalid under *Roe* v. *Wade*, 410 U.S. 113 (1973), the requirement that a Title X grantee refer a pregnant woman to a prenatal care facility, on the ground that the provision requires physicians "to refer patients only to 'pro-life' institutions." App., *infra*, 110a. At the same time, Judge Torruella would have upheld the exclusion of abortion-counseling from Title X programs because "[t]he government is not obliged under *Roe* to provide complete information on all child bearing alternatives to all women who could not otherwise afford it." App., *infra*, 116a. Judge Torruella also emphasized that the Sec-

cretary's refusal to fund abortion advocacy does not prohibit any advocacy that, but for Title X, would otherwise exist, and that "there are private and state agencies that will continue to provide these services." App., *infra*, 118a. He also noted that if the majority's construction of the First Amendment were consistently applied, it would invalidate "every non-neutral statement and every funding decision" made by the government, all of which necessarily advance or oppose contending views of social policy. *Ibid.*

5. The court of appeals granted the government's suggestion for rehearing en banc, and affirmed by a 4-1 vote, essentially for the reasons given by the panel majority. App., *infra*, 1a-57a. In addition, responding to this Court's intervening decision in *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989),[6] the en banc majority held that the regulations place an obstacle in the path of a woman's ability to have an abortion. App., *infra*, 34a-40a. The en banc majority reasoned that a woman treated at a project funded by Title X would receive "incomplete information" or "misinformation rather than no information about [her] options." App., *infra*, 34a, 35a. Moreover, since a woman would have spent some of her funds at a Title X clinic, the regulations reduce her ability to go elsewhere and therefore burden her right to obtain an abortion, and also "restrict[ ] the private funds available for abortion counseling and services." App., *infra*, 34a, 35a. The en banc majority also held that the invalid portions of the regulations were not severable from the remaining provisions, and therefore held the regulations invalid in their entirety. *Id.* at 47a-49a. Finally,

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[6] The panel majority had relied on the court of appeals' decision in *Reproductive Health Services* v. *Webster*, 851 F.2d 1071 (8th Cir. 1988), see App., *infra*, 90a-91a, which this Court subsequently reversed, 109 S. Ct. at 3050-3053.

the majority expressly disagreed with the result and the reasoning of the Second Circuit's decision in *New York* v. *Sullivan*, 889 F.2d 401 (1989), which had upheld the regulations against statutory and constitutional challenges. App., *infra*, 38a-40a.

Judge Torruella again dissented. Relying on this Court's decision in *Webster* and the Second Circuit's decision in *New York* v. *Sullivan, supra*, he concluded that "the Secretary has merely refused to fund an activity which the government is not constitutionally required to support, without imposing legal obstacles to a citizen's choice of action in a protected area." App., *infra*, 56a.

REASONS FOR GRANTING THE PETITION

The court of appeals erroneously decided several question of considerable public importance in a manner that expressly conflicts with the Second Circuit's decision in *New York* v. *Sullivan*, 889 F.2d 401 (1989), cert. granted *sub nom. Rust* v. *Sullivan*, Nos. 89-1391 & 89-1392 (May 29, 1990). The first three questions presented in this case are identical to the questions presented in the *Rust* case, which the Court has already decided to review. The Second Circuit upheld the regulations in their entirety over statutory and constitutional challenges and therefore did not reach the severability question, which the en banc First Circuit addressed. That question would arise in the *Rust* case, however, if the Court were to hold a portion of the regulations invalid. For these reasons, the petition in this case should be held and disposed of as appropriate in light of the Court's decision in the *Rust* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Rust* v. *Sullivan*, cert. granted, Nos. 89-1391 & 89-1392 (May 29, 1990).

Respectfully submitted.

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JUNE 1990

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1279

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PLAINTIFFS, APPELLEES

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter J. Skinner, *U.S. District Judge*]

Before CAMPBELL, *Chief Judge,* BOWNES, BREYER, TORRUELLA and SELYA, *Circuit Judges.*

March 19, 1990

OPINION EN BANC

BOWNES, *Circuit Judge.* The Secretary of Health and Human Services [HHS] appealed from an injunction issued by the district court of Massachusetts enjoining enforcement of regulations promulgated under Title X of the Public Health Services Act, 42 U.S. C. § 300 *et seq.* The

regulations significantly alter HHS's interpretation of section 1008 of Title X, which provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Prior to the promulgation of the new regulations, the Secretary construed section 1008 to prohibit the use of Title X funds to encourage or promote abortion but to permit nondirective counseling to pregnant women on all available medical and legal options, including abortion. The new regulations prohibit any counciling or referral for abortion services and redefine the scope of Title X projects to restrict privately funded abortion-related activities. The district court found that the new regulations represented an abrupt reversal of a longstanding agency policy, and concluded that each of the various provisions either exceeded the statutory authority of the Secretary or infringed upon constitutionally protected activities. The court therefore enjoined the enforcement or application of the regulations.

A panel of this court heard argument on July 28, 1988 and affirmed the opinion of the district court with one judge dissenting in part. That opinion was withdrawn and *en banc* hearing was held to consider the effect of the Supreme Court's decision in *Reproductive Health Services*, 109 S. Ct. 3040 (1989), which was issued after the panel opinion. In *Webster*, a sharply divided court upheld portions of a Missouri law that prohibited state funds or facilities from being used for abortions. The Court found that the Missouri law "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." 109 S. Ct. at 3052 (quoting *Harris v. McRae*, 448 U.S. 297 (1980)). The Court relied upon and reaffirmed the holdings of *McRae* and *Maher v. Roe*, 432 U.S. 464 (1977) and upheld the validity of *Roe v. Wade*, 410 U.S. 113 (1973) and the right of reproductive

choice. Thus *Webster* did not change the legal landscape upon which the panel opinion was based. We hold that although, with one exception, the regulations are permissible under the enabling statute, they are unconstitutional.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Title X Program

The Family Planing and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services

> to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . .

42 U.S.C. § 300(a). Title X grantees operate health care facilities offering a wide range of family planning information and services, including contraceptive prescriptions and counseling on all choices that follow pregnancy, and referrals to other medial service providers.

The majority of Title X grantees are public health clinics. Many of these clinics provide abortion facilities on the same site as the Title X project, sharing many of the same staff and resources but relying on nonfederal funds for the abortion-related activities. Under the prior policy many of the Title X grantees provided women with abortion counseling and referrals. This longstanding agency policy was embodied in the Program Guidelines issued by HHS in 1981 which required that pregnant women be provided the "nondirective" counseling and referrals on alternative courses of action, such as prenatal care and delivery, infant care, foster care, adoption. *See* Program

Guidelines for Project Grants for Family Planning Services (1981), *reprinted in* Joint Appendix (J.A.) at 71, 85.

No family planning project can be completely funded by Title X. 42 C.F.R. § 59.11(c). Projects that receive funds under Title X are required to provide nonfederal "matching funds" of at least 10% of the money provided through Title X. 42 U.S.C. § 300a-4. In fact, "matching funds" comprise a much larger portion of the budget than the required 10%. *See, e.g.* J.A. at 40-41, 55, 61-62. *See also Valley Family Planning v. North Dakota*, 661 F.2d 99, 100 (8th Cir. 1981) (Title X funds 33% of budget). This money is provided through state payments such as Medicaid, fees paid by the clients (based on a sliding scale) and private funds. At oral argument, the Secretary stated that federal government funds account for about 50% of the money received by Title X clinics.

Title X projects serve an estimated 14.5 million women. About a third of those who receive services are adolescents and approximately ninety percent of the women served had incomes below 150 percent of the poverty line. 131 Cong. Rec. S16860 (daily ed. Dec. 4, 1985). *See also* J.A. 40-41, 55, 61-62, 213. One of the most frequent reasons for an initial visit to a Title X family planning facility, particularly by adolescents, is for a pregnancy test. Program Guidelines for Project Grants and Family Planning Services, Public Health Service, 1981, J.A. at 71, 84.

B. The New Regulations

On February 2, 1988, the Secretary promulgated the superseding regulations that are at issue in this case. The relevant provisions are set forth in Appendix A. These regulations significantly alter the previous agency interpretation of Title X by prohibiting nondirective abortion counseling or referral and by enlarging the degree of

financial and physical separation required between federally and nonfederally funded activities conducted by a Title X grantee.

The new regulations change many aspects of the existing regulations. Our focus will be on a few particular changes. First, some key definitions have been changed. In section 59.2 the term "family planning" is redefined to refer solely to "preconceptional" services. The result, if the regulations are implemented, would render Title X funds no longer available for pregnancy or post-partum services. "Title X program" and "Title X project" are also redefined to include not only grant funds but also "grant-related income or matching funds." 42 C.F.R. § 5.2. By virtue of this change, the extensive prohibitions against counseling, referral and abortion-related activities in the regulations apply broadly to recipient generated income as well as to federal funds.

As mentioned, the regulations reverse the preexisting policy of nondirective counseling. 42 C.F.R. § 59.8. Specifically, they prohibit counseling or referral for abortion as a method of family planning and require that all Title X clients diagnosed as pregnant receive "a list of available providers that promote the welfare of mother and unborn child" as well as information "necessary to protect the health of the mother and unborn child." 42 C.F.R. § 59.8(a). In an emergency, a Title X entity may refer a client to a provider of "emergency medical services." *Id.* The regulations also specifically prohibit a Title X entity from circumventing the abortion prohibitions by using the list of referrals "as an indirect means of encouraging or promoting abortion as a method of family planning." 42 C.F.R. § 59.8(a)(3). Finally, although a Title X entity may provide information that is medically necessary to assess the relative risks and benefits of various contraceptive methods, that information may not

include the counseling or promotion of abortion. 42 C.F.R. § 59.8(a)(4).

The new regulations also require that Title X entities be "physically and financially separate" from entities providing proscribed activities or information. 42 C.F.R. § 59.9. The Title X entities must have "an objective intergrity and independence" that reaches beyond separate bookkeeping to include separation of accounting records, facilities and personnel and even separate signs for the federally and nonfederally funded activities. *Id.*

The new regulations also require that Title X entities be "physically and fi. ncially separate" from entities providing proscribed activities or information. 42 C.F.R. § 59.9. The Title X entities must have "an objective integrity and independence" that reaches beyond separate bookkeeping to include separation of accounting records, facilities and nonfederally funded activities. *Id.*

Finally, the regulations contain a list of prohibited activities including lobbying for pro-choice legislation, providing speakers to promote the availability of abortion, providing speakers to promote the availability of abortion, paying dues to groups that advocate abortion and engaging in legal action or developing and disseminating materials to promote abortion as an option in the case of an unintended pregnancy. 42 C.F.R. § 59.10.

II. PROCEEDINGS BELOW

Appellees, the Commonwealth of Massachusetts, the National Family Planning and Reproductive Health Association (NFPRHA) and the American Public Health Association filed suit for declaratory and injunctive relief in federal district court on February 2, 1988. The district court allowed the intervention of Mary Moe, a low-income woman dependent upon a Title X entity for her health care needs.

In their joint complaint, appellees charged that the new regulations reversed a consistent and longstanding agency interpretation of Title X without any justification, and violated both congressional intent and the constitutional rights of Title X grantees and their clients. Appellees filed a motion for preliminary injunction on February 9, 1988, alleging that implementation of the regulations would undermine seriously the quality and character of the Title X program. The Secretary opposed the motion for a preliminary injuction and moved that the action be dismissed, or, in the alternative, that summary judgment be granted.

The district court held a hearing on February 18, 1988, and issued a final decree on March 3, 1988, consolidating the preliminary injuction with a decision on the merits. In its opinion, the court addressed both the statutory and the constitutional issues. *Massachusetts v. Bowen*, 679 F. Supp. 139 (D. Mass. 1988). The court considered the various sections of the new regulations independently and found that the prohibition on abortion counseling and referral exacted a penalty for the exercise of protected speech. It also found that the prohibition constituted a content-based restriction unsupported by a compelling government interest. The court therefore enjoined the enforcement of section 59.8 on first amendment grounds.

The court then considered the restrictions on lobbying and advocacy. It found that section 59.10 had a more far-reaching effect than a mere refusal to subsidize. In light of the restriction on the use of nonfederal funds and the requirement of complete financial and physical separation contained in sections 59.2 and 59.9, the court held that the Secretary had imposed an unduly burdensome requirement on Title X grantees that was not narrowly tailored to meet the legitimate goal of not subsidizing advocacy. The court further found that section 59.10 constituted a

content-based restriction that violated the first amendment and enjoined the enforcement of that provision. In addition, the court enjoined the enforcement of section 59.9, finding that the physical and financial separation requirement violated the congressional intent to create coordinated family planning services. And finally, the court concluded that the restriction imposed by the new regulations on the flow of neutral information concerning abortion to pregnant women violated the right to privacy as established in *Roe v. Wade*, 410 U.S. 113 (1973).

III. STATUTORY ANALYSIS

Because courts should only decide unavoidable constitutional questions, we begin our analysis with an inquiry into whether the new regulations exceed the Secretary's authority under Title X. *See, e.g., Harris v. McRae*, 448 U.S. 297, 307 (1980) (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)); *Benoni v. Boston and Maine Corp.* 828 F.2d 52, 57 (1st Cir. 1987).[1] The Secretary is empowered by the statute to promulgate regulations to ensure that the grants are made in accordance with the statute. 42 U.S.C. § 300a-3. The Secretary, of course, must issue regulations that implement the intention of Congress. Thus the interpretive question posed is

> whether Congress [has] directly spoken on the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.

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[1] The Secretary, in supporting his construction of the statute as manifest in the regulations, seemingly urges us to consider the constitutional questions. He argues that if there are constitutional issues here "there is no construction of the regulations by which [they] can be avoided." Appellant's Reply Brief at 15.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Four factors should be considered in attempting to ascertain congressional intent: (1) the language of the statute; (2) the contemporaneous legislative history; (3) any subsequent legislative history; and (4) agency interpretation(s) of the statute. *Consumer Product Safety Comm. v. GTE Sylvania,* 447 U.S. 102, 108-120 (1980). If an examination of these factors does not reveal the legislative intent, then deference to the agency interpretation of the statute is appropriate *if* the agency interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Of course, less deference is due to an agency's position that is inconsistent with a prior consistently held agency view. *I.N.S. v. Cardoza-Fonseca,*, 107 S. Ct. 1207, 1221 n.30 (1987). With these guidelines in place, we turn to the statute.

1. *Statutory Language*

We start with the language of section 1008 of Title X: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Both appellees and the Secretary contend that the "plain meaning" of this sentence requires the result they seek.

Appellees argue that the ordinary meaning of the words in the statute prohibits only the funding of abortions and does not reach the funding of abortion counseling or referral. Appellees also contend that section 1008's prohibition applies to programs funded by Title X and may not be extended to prohibit abortion activities funded privately by a recipient organization.

The Secretary disputes that reading and argues that the new regulations are consistent with the language of the statute. He contends that the new regulations more closely follow the prohibition of section 1008 by recognizing the importance of counseling and referral to family planning

and by prohibiting any abortion-related activity in those areas and limiting the services of the clinics to only preconceptional services. The Secretary further argues that the prohibition on abortion stated in section 1008 limits the statutory language favoring integration and coordination of family planning services and that the program separation requirements of the new regulations are therefore consistent with the statute.

The statutory language is inconclusive. The prohibition in section 1008 is phrased broadly and is susceptible of many differing interpretations. *Accord* Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, Division of Public Health Grants and Services, to Louis H. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971), *reprinted in* J.A. at 108. It is not enought for appellees to show that the statutory language does not expressly forbid counseling and referral or mandate complete physical and financial separation. The Secretary's construction does not contravene the express language of the statute itself. We must therefore look beyond the exact wording of section 1008 to attempt to assess the meaning of the statute. *Accord Planned Parenthood Fed'n of America v. Bowen*, 680 F. Supp. 1465, 1468 (D. Colo. 1988); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y.), *aff'd*, 863 F.2d 46 (2d Cir. 1989).

2. Legislative History

Appellees argue that Congress intended to provide a full range of information to Title X clinic clients and to coordinate *all* family planning services. The Secretary argues that Congress intended to fund only *preventive* family planning and that the new regulations are therefore more consistent with the legislative intent than the previous agency mandate for nondirective counseling.

The legislative history is inconclusive in most respects. The statement of purpose in the House Report preceding the passage of Title X stressed the importance of supplying

both family planning services and a full range of family planning information and of developing a comprehensive and coordinated program. H. Rep. No. 1472, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068. The Conference Report stated that funding would be used only to support preventive family planning, with the caveat that Title X programs should be fully coordinated with state and local programs which by implication included programs that counselled or provided abortions. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081. There is language in the legislative history that can be read as allowing non-grant money to be used for abortion related activity:

> The conferences have adopted the language contained in section 1008, which prohibits the use of such funds for abortion. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

Id. at 5082.

The Secretary attempts to bolster his legislative history argument by relying on a few comments by Congressman Dingell made during the House debate. Such comments are accorded little weight when compared with other tools of statutory interpretation. *Consumer Products,* 447 U.S. at 118; *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979). In addition, these comments are neither persuasive nor unambiguous.[2] Thus the legislative intent about the scope of the abortion prohibition is unclear.

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[2] The Secretary attached to his brief comments received in response to the proposed regulations from Representative Dingell, in which Dingell claims that the Secretary misunderstands his statements in the congressional debate.

There was clearly expressed legislative intent to expand the level of family planning services provided to low-income women and to coordinate family planning services. The district court ably surveyed this evidence:

> The legislative history of Title X offers persuasive evidence that the program integrity regulations run contrary to congressional intent underlying section 1008. The original Conference Report on Title X stated that the abortion prohibition was "not intended to interfere with or limit programs" supported with other than Title X funds. H.R. Conf. Rep. No. 1667, 81st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5082. Furthermore, the Report of the Senate Labor and Public Welfare Committee for the 1975 reauthorization of Title X provided:
>
> > The Committee encourages the use of funds otherwise authorized by this bill for the provision of family planning services, not only in specialty clinics, but, where such facilities do not exist or are impractical, in entities devoted to comprehensive health care for low-income families. . . . [I]t is essential that there be close coordination and, whenever possible, integration of family planning services into all general health care programs.
>
> S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 528.

The contemporaneous and continuous agency interpretation was consistent with this view. Indeed, the statute itself mandates "a State plan for a coordinated and comprehensive program of family planning services." 42 U.S.C. § 300a(a) (1982). The requirement of

> physical separation runs contrary to this congressional emphasis on coordinated and integrated health care services.

Massachusetts v. Bowen, 679 F. Supp. at 143. Appellees submitted numerous affidavits stating that the new regulations would require many clinics either to give up their Title X funding or to terminate family planning services altogether. *See, e.g.*, Affidavit of Leslie Tarr Laurie, Executive Director of Family Planning Council of Western Massachusetts, *reprinted in* J.A. at 40, 41; Affidavit of Diane M. Booth, Executive Director of Planned Parenthood of Central Missouri, *reprinted in* J.A. at 55, 57; Affidavit of Karen Cody Carlson, Executive Director of Planned Parenthood of Greater Kansas City, *reprinted in* Joint Appendix at 61, 63; *and* Affidavit of Mary Russell, Director of Family Planning for Action for Boston Community Development, *reprinted in* J.A. at 213, 215. We agree with the district court that the requirement of physical and financial separation set forth in section 59.9 violates congressional intent because of the effect it would have of limiting family planning programs. That result would be completely contrary to the express Congressional intention to expand family planning services. We affirm the district court's conclusion that the promulgation of section 59.9 exceeds the Secretary's authority and we enjoin its enforcement.

3. ***Subsequent Legislative History***

The contemporaneous legislative history does not directly address the issues of abortion counseling and referral or lobbying and advocacy, so we turn to subsequent legislative history for guidance. We are aware of the longstanding priniciple that "the views of a subsequent Congress form a hazardous basis for inferring the intent

of an earlier one." *Consumer Product Safety Comm'n,* 447 U.S. at 117-19 (footnote omitted) (citing *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 348-49 (1963) which quotes *United States v. Price,* 361 U.S. 304, 313 (1960)). We also recognize that subsequent legislative *history* provides an even shakier ground than subsequent legislative *action* from which to infer original intent. *Id.* at 118 n.13. Nonetheless, subsequent Congressional inaction may signal acquiescence to an agency interpretation. *Haig v. Agee,* 453 U.S. 280, 300-01 (citing *Zemel v. Rusk,* 381 U.S. 1, 11-12 (1965)) (the amendment of one statute, considered in light of the failure to amend another related statute, under which the Secretary of State had asserted broad powers, may indicate congressional acquiescence to the administrative construction of the unmodified statute). *Accord North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 534-35 (1982).

Congressional inaction in the face of agency action on a subject of heated national interest and debate also merits additional consideration and weight. *Bob Jones Univ. v. United States,* 461 U.S. 574 (1983). In *Bob Jones Univ.,* the Internal Revenue Service changed a longstanding policy and issued a new ruling that denied tax-exempt status to private schools practicing racial discrimination. The Court upheld the agency ruling, stating:

> [F]ew issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the denial of

> tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

Id. at 599.

Appellees analogize this case to *Bob Jones Univ.* They contend that the failure of Congress to amend section 1008, despite repeated amendments, reauthorizations and reenactments of Title X,[3] indicates acquiescence to the agency's preexisting policy of allowing nondirective counseling as provided for in the 1981 Program Guidelines. Appellees argue that this congressional inaction merits additional weight, under the principle of *Bob Jones Univ.*, because of the volatility and importance of the national controversy over abortion rights.[4]

The Secretary disagrees on two grounds. First, he argues that the subsequent legislative history of Title X reflects confusion over the scope of the abortion prohibition and therefore Congress cannot be deemed to have ratified an agency construction that it did not wholly understand. Second, he argues that, even if we could infer ratification of the previous agency interpretation, such ratification would merely reflect acquiescence to a prior policy—it would not indicate that the Secretary's new policy exceeds his statutory authority.

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[3] Title X has been reauthorized six times. *See Brief of Amici Curiae Rep. Patricia Schroeder et al.* 17 n.16 (collecting citations).

[4] The Colorado federal district court found this argument persuasive in its analysis of the new Title X regulations. *See Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1465, 1472 (D. Colo. 1988) ("Congressional refusal on repeated occasions to change its policy permitting the neutral dissemination of information about abortion represents ratification of said policy.").

The Secretary's second argument is persuasive. Although appellees have stated a strong case for congressional acquiescence, the ratification of one agency policy by Congress does not preclude a change in that policy. In *Bob Jones Univ.*, congressional acquiescence in agency policy was used as proof that an agency was acting within its statutory authority. Here appellees would use congressional acquiescence to prior agency policy as proof that a change in that policy is beyond the scope of its statutory mandate. The Court rejected similar reasoning in *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). In that case, the Court reviewed a decision of the Secretary of Transportation to rescind a requirement that automobiles be equipped with passive restraints and held that previous congressional support for the passive restraint requirement did not preclude a change in policy:

> While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation.

Id. at 45 (citing *Bob Jones Univ.*, 461 U.S. at 599-602; and *Haig*, 453 U.S. at 291-300). Similarly, in the present case, congressional support for a narrow reading of the abortion prohibition does not necessarily indicate that the new regulations violate congressional intent.

4. *Contemporaneous Agency Policy*

An agency's contemporaneous construction of its founding statute should be given deference. Moreover, a contemporaneous construction "deserves special deference

when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (citations omitted). *Accord Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68 (1980). Such deference is necessary because a contemporaneous construction is more likely to reflect the intent of the enacting Congress. *See St. Luke's Hosp. v. Secretary of Health and Human Servs.*, 810 F.2d 325, 331 (1st Cir. 1987).

Appellees argue that the agency's contemporaneous and consistent interpretation of section 1008 to permit nondirective counseling and to encourage coordination with local and state family planning services is entitled to substantial deference. The Secretary construes the contemporaneous policy of HHS differently. He argues that the thrust of prior policy was a prohibition on any encouragement or promotion of abortion; the new regulations remain true to that policy and merely readjust the level at which prohibited encouragement is deemed to commence.

The Secretary's position is untenable. We agree with both the court below and the district court in Colorado that the new regulations constitute a radical break from a prior consistent policy permitting nondirective counseling: "[F]rom the time Congress enacted § 1008 in 1970, [the Secretary] consistently interpreted it to permit the neutral dissemination of information about abortion, and the referral upon request to entities which provide abortion." *Planned Parenthood Fed'n of America*, 680 F. Supp. at 1471.

There are three independent interpretations of section 1008 that support our conclusion. First, a 1971 memorandum from the office of General Counsel to the Deputy Assistant Secretary for Population Affairs states that, although section 1008 should be read broadly to prohibit any encouragement or promotion of abortion, it should not be read so broadly as to impede the coordination of

family planning activities. *See* Memorandum from Joel M. Mangel, *reprinted in* J.A. at 110. Second, a report from the office of the General Counsel to the Senior Attorney, Public Health Division, states:

> This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program. Under this view, *the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion,* and the collection of statistical data and information regarding abortion *are not considered to be proscribed by* § 1008. The provision of "pregnancy counselling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008.

Memorandum from Elsie Sullivan, Assistant for Information and Education, Office of Family Planning, to Senior Attorney, Public Health Division (Apr. 1, 1978), *reprinted in* J.A. at 113, 114-15 (footnotes omitted) (emphasis added). And finally, the 1981 Program Guidelines issued by HHS specifically require nondirective counseling for pregnant women:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given nondirective counseling on the following alternative courses of action, and referral upon request:
>
> * Prenatal care and delivery
> * Infant care, foster care, or adoption
> * Pregnancy termination

Program Guidelines for Project Grants for Family Planning Services, *reprinted in* J.A. at 85. The record, therefore, reflects a consistent agency interpretation that permitted nondirective counseling, encouraged coordination of all family planning services and prohibited only active encouragement or promotion of abortion.

Such a contemporaneous agency construction is compelling but we cannot conclude on the basis of this evidence alone that the congressional intent is unambiguous. Congress has not addressed specifically the question of the scope of the abortion prohibition. The language of the statute and the legislative history can support either of the litigants' positions. Therefore, we must determine whether the new regulations are a *permissible* construction of Title X. *See Chevron*, 467 U.S. at 842-43.

5. *Deference to the Agency Construction*

The district court found that the Secretary had failed to justify the change in policy embodied in the new regulations. In its opinion, the court held the regulations to a heightened standard of review: "[W]hen an agency decides to change the course of a longstanding administrative interpretation, it must justify its action to a greater degree than when it first promulgates regulations." 679 F. Supp. at 141-42 (citing *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 41-42). We find heightened scrutiny unwarranted.

When an agency rescinds or modifies a policy, its actions are subject to the same standard of review as that applied to the orginal promulgation of a policy: the arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41. Such review, although narrow, is still broader than that accorded to a refusal to promulgate rules in the first instance:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation con-

> stitutes a reversal of the agency's former views as to the proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 41-42. The heightened standard referenced by the district court is adjudged in comparison to a refusal to act, not in comparison to a previous promulgation of rules. *Cf. Heckler v. Chaney,* 470 U.S. 821 (1985) (agency refusal to take enforcement action presumptively unreviewable). The standard of review applicable to both original agency action and agency rescission or modification of a prior standard requires the agency action to be "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 42. Applying this standard to the case at bar, we must decide whether the Secretary has provided a "reasoned analysis" for the change in agency policy.

The Secretary advances two bases for the new regulations. *See* 53 Fed. Reg. 2922 *et seq.* (Feb. 2, 1988), *reprinted in* J.A. at 169. First, he argues that the new regulations more closely conform to the language of section 1008. *See* 53 Fed. Reg. at 2923. We have already found that the statutory language is ambiguous and susceptible to differing interpretations so that the argument is unpersuasive. Second, the Secretary argues that, even if not mandated by the express language of section 1008, the new regulations more "faithfully and effectively" implement the abortion prohibition. 53 Fed Reg. at 2923. The Secretary cites reports by the Office of the Inspector General (OIG) and the General Accounting Office (GAO) to support his assertion that Title X projects required

guidance "to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.*

The reports provide a very slim reed of support. Both reports found that Title X grantees were aware of and acted in accordance with the prohibition against the encouragement or promotion of abortion.[5] The two reports did suggest, however, that the Secretary clarify the agency's preexisting policy position on abortion-related

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[5] The GAO summarized the agency's construction of that prohibition as follows:

> Based on HHS' legal opinions, the following types of activities related to abortions are allowable under title X programs. Recipients *may:*
>
> - provide information about abortion services;
> - provide the name, address, and telephone number of abortion providers;
> - collect statistical data and information regarding abortion;
> - inspect facilities to determine their suitability to provide abortion services; and
> - pay dues to organizations that advocate the availabiltiy of abortion services.
>
> Recipients *may not*
>
> - provide counseling that encourages a person to obtain an abortion,
> - provide transportation to an abortion center or provider,
> - provide proabortion speakers to debate the issues in public forums,
> - advocate the need and suitability of abortion service in the community,
> - produce or show movies that tend to encourage or promote a favorable attitude toward abortion,
> - provide abortion as a suitable backup method of family planning,
> - make specific appointments or referrals for an abortion unless medical conditions warrant,
> - bring legal action to liberalize abortion-related statues, and
> - pressure local governing bodies to change restrictive abortion policies.

Report by the Comptroller General (Sept. 24, 1982), *reprinted in* J.A. at 125, 144-45.

activities. The GAO report further suggested that, given the sensitivity of the abortion controversy, the agency might look to Congress for any further guidance on the scope of the abortion prohibition. The OIG and the GAO reports only called for a clarification of existing standards. The Secretary construes the reports more broadly and argues that the suggestion of clarification provides support for the promulgation of wholly new and modified regulations.

Were we to apply a heightened standard of review, we well might find the Secretary's rationale lacking; however, our scope of review is narrow. We must " 'uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.' " *Motor Vehicles Mfrs. Ass'n,* 463 U.S. at 43 (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.,* 419 U.S. 281, 286 (1974)). We may not apply a heightened scrutiny to the actions of the Secretary in order to avoid the more difficult constitutional issues raised by the abortion controversy.[6] Although these facts present a very close case, we cannot say that the Secretary has failed utterly to provide a reasoned basis for change. We must defer to the agency construction of the statute.

6. *Conclusion*

Our examination of the traditional elements of statutory construction yields the following results. The plain words of the statute are susceptible to differing interpretations. The contemporaneous legislative history is inconclusive, except on the issue of program coordination. The subsequent legislative history indicates congressional acquiescence to the previous agency policy promoting nondirective counseling, but this acquiescence does not

[6] *Cf. Roe v. Wade,* 410 U.S. at 116 ("We . . . acknowledge . . . the sensitivity and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. . . . Our task, . . . is to resolve the issue by constitutional measurement, free of emotion and of predilection.")

preclude a change in agency policy. And finally, because of the deference due an agency's interpretation of an enabling statute, the Secretary's new policy is not impermissible under the statute. We turn therefore to the constitutional questions presented by the new regulations.

IV. THE RIGHT OF REPRODUCTIVE CHOICE

Appellees argue that even if the counseling and referral regulations do not violate Title X, they are an unconstitutional encroachment upon a woman's right to reproductive choice because they impermissibly restrict the information a Title X client receives during pregnancy counseling and by impermissibly restricting the contours of the physician-patient relationship in a Title X project. *Roe v. Wade,* 410 U.S. 113 (1973). The Secretary attempts to refute that contention with the bald assertion that the regulations merely implement a funding decision to support childbirth over abortion and that the regulations impose no obstacle whatsoever to a woman's choice between those alternatives. *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989); *Harris v. McRae,* 448 U.S. 297 (1980); *Maher v. Roe,* 432 U.S. 464. We find the Secretary's reliance on *Webster, Maher* and *McRae* misplaced.

We note first that the HHS regulations implicate more significant rights than those at issue in *Webster* and that the regulations create exactly the type of obstacle about which the *Webster* Court was concerned. *Webster* did not involve a first amendment issue and, as the Court explicitly noted, the Missouri statute only concerned funding of abortions and not the conduct of physicians. 109 S. Ct. at 3053. For these reasons, *Webster* does not dictate a reversal as the Secretary urges.

Because the new regulations do pose a significant obstacle to a Title X client's decision to terminate her pregnancy by curtailing her ability to receive counseling on abortion from the physician responsible for her medical care. We therefore find them unconstitutional.

Our analysis starts with the uncontested proposition that the Constitution protects a woman's independence in making "certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977) (footnote omitted). *See also Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). That protection extends to decisions concerning both childbirth and the termination of a pregnancy. *See Roe v. Wade*; *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983); *Thornburgh,* 476 U.S. at 747.

To ensure independence in a woman's decisionmaking, the Supreme Court has rejected attempts to intrude into the dialogue between a woman and her physician. *See, e.g. Akron,* 462 U.S. at 442-47; *Thornburgh,* 476 U.S. at 763-765. In *Akron* and *Thornburgh,* the Court invalidated informed consent provisions designed to influence a woman's choice between childbirth and abortions, reaffirming a woman's right "in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the state.' " *Akron,* 462 U.S. at 429-30 (quoting *Roe v. Wade,* 410 U.S. at 163) (footnote omitted). *See also Thornburgh,* 476 U.S. at 761-64.

In *Akron,* the Court struck down a city ordinance that required, *inter alia*, a woman's physician to make specified statements to the patient prior to performing an abortion in order to ensure that the woman's consent was "truly informed." *Id.* at 423. The ordinance was unconstitutional for two "equally decisive" reasons. *Id.* at 445. First, the ordinance required that "dubious facts" be provided in order to manipulate a woman's choice between childbirth and abortion. As the Court stated, "It is fair to say that much of the information required is designed not to inform the

woman's consent but rather to persuade her to withhold it altogether." *Id.* at 444. Second, the Court found that, by requiring a physician to provide specified information to a client, the ordinance placed a physician in an " 'undesired and uncomfortable straightjacket.' " *Id.* at 445 (quoting *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 67 n.8 (1976)). The court stressed the role of the doctor in the woman's decision stating that "it remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.* at 443. The Court concluded:

> By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'

Id. at 445 (quoting *Whalen v. Roe,* 429 U.S. at 604 n.33) (footnote omitted).

Both of *Akron's* "equally decisive" reasons were used by the Court in striking down the informed consent provision at issue in *Thornburgh.* The Court warned that, although informed consent provisions were not unconstitutional as a general rule, "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh,* 476 U.S. at 760 (quoting *Akron,* 462 U.S. at 443-444). The state statute at issue required that a list of agencies offering alternatives to abortion and a description of fetal development be provided. The Court described those materials as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762. The Court explicit-

ly condemned the requirement of a list of agencies providing alternatives to abortion as a distortion of the physician-patient relationship:

> Even the listing of agencies . . . presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. . . . All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

Id. at 762-63 (citation omitted).

The regulations at issue here attempt to structure the physician-patient dialogue and thereby influence a woman's choice between childbirth and abortion even more completely than the informed consent provisions at issue in *Akron* and *Thornburgh*. Not only do the regulations *require* the Title X project to furnish all clients with "a list of available providers that promote the welfare of the mother and unborn child," but they also *forbid* Title X projects from providing "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion as a method of family planning." 42 C.F.R. § 59.8(a).

The requirement that a list of agencies offering prenatal care be provided, standing along, could well be enough to strike down the entire set of regulations because it at-

tempts to persuade a woman to opt for childbirth over abortion by presenting limited and biased information and by rendering the decision to abort more difficult. Furthermore, the requirement forces the attending physician to endorse providers that "well may be out of step with the needs of the particular woman." The listing of agencies does not stand alone, however. By coupling that requirement with a prohibition against nondirective counseling or referral to an abortion provider, regardless of the doctor's judgment concerning the most appropriate medical care or the woman's request for specific information, the Secretary has intruded even further into constitutionally protected decisionmaking.

Read together, the new regulations force all Title X projects to provide incomplete and skewed information and to withhold requested, possibly even medically advisable, information. Paraphrasing *Thornburgh,* we find:

> The [federal government is] not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellant[ ] claim[s] that the [regulations] before us today further legitimate compelling interests of the [government]. Close analysis of those [regulations], however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.

Id. at 759.

The regulations also run afoul of our holding in *Planned Parenthood League of Massachusetts v. Bellotti,* 641 F.2d 1006 (1st Cir. 1981), in which we invalidated a twenty-four waiting period requirement contained in a Massachusetts statute regulating abortions because it constituted "a substantial state-created burden on a woman's

fundamental right," unjustified by a compelling state interest. *Id.* at 1015. The waiting period posed a substantial burden because the delay increased the medical risks of abortion and increased the ancillary costs to a woman desiring an abortion:

> [T]he fact that the form must be signed at least 24 hours prior to an abortion necessitates that a woman undertake at least two separate trips to obtain an abortion. . . . This effect necessarily imposes burdens in terms of time, money, travel and work schedules; for many women, particularly the poor, the rural, and those with pressing obligations, these burdens will be substantial.

Id. (citations omitted). *Accord Akron,* 462 U.S. at 450-51 (twenty-four hour waiting period invalid because it intrudes upon physician discretion). Similar burdens are imposed upon Title X clients under the new regulations. By prohibiting nondirective counseling and eliminating all agencies providing abortions from referral lists, the regulations impose substantial delay and additional costs upon a woman desiring to terminate her pregnancy. Some low-income women may be unable to obtain any information on abortion at all without the help of Title X clinic. For others, the delay between the moment when they learn of their pregnancy and the time they obtain information on abortion may greatly increase the risks inherent in the abortion procedure.[7]

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[7] Dr. George Morley, president of the American College of Obstetricians and Gynecologists, stated in his affidavit that the delay caused by the new regulations might endanger women by pushing the time of abortion into the second trimester of pregnancy. He explained: "Abortions performed later in pregnancy are closely associated with increased morbidity and mortality risks. For example, although only a small percentage of abortions are performed during the second trimester of pregnancy, they caused approximately half of all abortion-related deaths between 1972 and 1981." Affidavit of George W. Morley, M.D., *reprinted in* J.A. at 27, 30.

Our discussion in *Bellotti* of the Massachusetts informed consent requirement is also informative. The consent form mandated by the statute required a discussion of the abortion procedure, a description of fetal development and a statement that the decision *not* to abort would not constitute grounds for the denial of public assistance. We found that although the form "comes close to an impermissible intrusion into the physician-patient relation," several factors saved it from invalidity. 641 F.2d at 1017. Most importantly, we noted that the statute did not require a physician personally to read the form to the patient or to verify that she had read it herself, and that a physician could offer any additional information she felt necessary: "[T]he physician remains completely free to give any additional information desired regarding abortion, whether complementary to or contradictory of the information contained in the . . . form." *Id.* at 1017-18 (footnote omitted). That saving characteristic is not present in the new regulations. To the contrary, the regulations prohibit a wide range of additional information. According to Dr. Morley, this prohibition not only endangers the health of the woman, but it also contravenes medical ethics:

> [I]f all a health care professional is able to do in a situation where medical treatment is indicated is to advise the patient of the diagnosis and refer, such a limitation also would violate medical ethics and standard of practice. When a condition warranting treatment is diagnosed, even if referral is required, it is necessary to counsel on all options (including abortion) and make a referral consistent with the patient's informed decision.

Affidavit of Dr. Geroge W. Morley, *reprinted in* J.A. at 32. The regulations, therefore, not only attempt to in-

fluence a woman's decision but they also place a straightjacket on the physician, forcing her to depart from accepted standards of practice. The Court explicitly has rejected such regulation. *See Akron,* 462 U.S. at 431 (state may not regulate in manner which causes departure from "accepted medical practice").

The effect of the new regulations is to infringe upon women's freedom of reproductive choice by denying them access to important information and by interfering with the physician-patient relationship. These encroachments most often occur during the first trimester of pregnancy, when a woman's privacy interests are most unrestricted:

> [F]or the period of pregnancy prior to [the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe, 410 U.S. at 163. We recognize, of course, that even during the first trimester, a woman's privacy right is not absolute. In *Akron,* the Court held:

> Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives . . . . But even these minor regulations on the abortion procedure during the first trimester may not interfere with the physician-patient consultation or with the woman's choice between abortion and childbirth.

462 U.S. at 430 (citation omitted).

In his brief, the Secretary has neither argued that the regulations advance important health objectives nor refuted appellees' contention that they interfere with the physician-patient dialogue and a woman's freedom of

reproductive choice. Rather the Secretary has relied solely on *Webster, Maher,* and *McRae* claiming that the regulations reflect a legitimate funding decision to favor childbirth over abortion. Those cases do not change our result.

In *Webster,* the Court reversed an Eighth Circuit opinion that had declared the public funding restrictions of a Missouri abortion law unconstitutional. The law prohibited public facilities from being used for or public employees from performing or assisting most abortions. In upholding the law, the Court relied upon and reaffirmed the teachings of *McRae* and *Maher. Webster,* 109 S. Ct. at 3051-53. The Court stated that Missouri's choice "to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' " *Webster,* 109 S. Ct. at 3052 (*quoting McRae,* 448 U.S. at 315.)

The Eighth Circuit had also struck down a portion of the Missouri law that prohibited the use of state funds or facilities for counseling or encouraging a woman to have an abortion. In addition, state employees were prohibited from counseling or encouraging abortions. The State did not appeal the decisions on the uses of state facilities or employees for counseling, so those rulings still stand. In appealing the limitation on the use of state funds for counseling, Missouri construed the law as only limiting the actions "of those persons responsible for expending public funds" and stated that the restriction "is not directed at the conduct of any physician." *Webster,* 109 S. Ct. at 3053. Because of that limiting definition, the Webster plaintiffs were no longer adversely affected by the law and the Eighth Circuit's decision was unanimously held moot. *Webster,* 109 S. Ct. at 3053-54. In discussing the mootness issue several justices noted that if the ban were interpreted

to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women," a serious controversy would exist. *Id.* at 3060 (O'Connor, J., concurring); *Id* at 3068-69 n.1 (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part).

In *Maher,* the Court upheld a regulation promulgated by the Connecticut Welfare Department that limited state Medicaid benefits for first trimester abortions to those which were deemed medically necessary. The Court found that although the regulations may well have rendered childbirth a more "attractive alternative," they imposed no restrictions on a woman's access to abortion and thereby did not infringe upon her constitutional right to reproductive choice. 432 U.S. at 474. The court explicitly distinguished the regulations under consideration from a government effort to restrict a woman's freedom in decisionmaking: "Our conclusion signals no retreat from *Roe* or the case applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher,* 432 U.S. at 475 (footnote omitted).

The Court affirmed *Maher,* reasoning in *McRae* by upholding an amendment to Title XIX of the Social Security Act that restricted the use of federal Medicaid funds to support certain medically necessary abortions. The Court explained that the amendment created no obstacle to a woman's freedom of choice: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *McRae,* 448 U.S. at 316 (citing *Maher*).

The emphasis in both *Maher* and *McRae* was on preexisting limitations on a woman's access to abortion

which the government failed to alleviate through funding.[8]

The distinction between refusals to fund abortion and incursions upon the decisional process is explicitly recognized and illustrated by a juxtaposition of text and footnote in *Akron*. In the body of its opinion, the Court stated that while some informed consent provisions *may* pass constitutional muster, the state could not attempt to direct the flow of information on abortion through such provisions:

> This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

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[8] *See, e.g.*, the hypothetical case discussed in *McRae*:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, 374 U.S. 498, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment benefits from such a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her sabbath.

448 U.S. at 317 n.19. Similarly in *Maher* the Court stated that

> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to benefits, we would have a close analogy to the facts in *Shapiro* [*v. Thompson*], and strict scrutiny might be appropriate . . . .

432 U.S. at 474 n.8.

Akron, 462 U.S. at 443-44. In a footnote to this passage, the Court distinguished state provisions designed to effect the decisional process by regulating the flow of information from the provisions at issue in *Maher* and *McRae* which merely provided financial support for a policy choice: "This legislation to further an interest in preferring childbirth over abortion was permissible . . . only because it did not add any 'restriction on access to abortions that was not already there.' " *Akron*, 462 U.S. at 444 n.33 (citing *Maher*, 432 U.S. at 474). As we mentioned initially, *Webster* reaffirmed the validity of *McRae* and *Maher*.

V. OBSTACLES TO ABORTION CREATED BY THE REGULATIONS

In the instant case, the Secretary's policy does not merely fail to remove obstacles to abortions—it creates obstacles. By insisting upon a one-sided flow of information to Title X clients and by prohibiting the provision of nondirective counseling, the regulations place significant limitations upon a woman's freedom of reproductive choice. In *Akron*, the Court specifically recognized that denial of information about abortion (rather than funding) was an impermissible obstacle. *Akron*, 462 U.S. at 445. Due to the combination of government compelled disclosures and nondisclosure, a Title X client will make a decision concerning her pregnancy based upon a distorted consultation marred by medically incomplete information and referrals. *Cf.* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1921-22 (1988) (government sponsored programs prohibited from providing abortion counseling or referral "manipulate the abortion decision itself by deliberately providing distorted information.") (footnote omitted). Both *Maher* and

McRae emphasized that the contested provisions left the woman's decisional process intact; in the instant case, that process is undermined through a government crafted restructing of the physician-patient dialogue. Regulating the substance of the dialogue between physician and patient in order to influence a woman's decision concerning her pregnancy creates a new and imposing obstacle to abortion.

We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

The regulations create an additional obstacle by restricting the private funds available for abortion counseling and services. As we have said before, "the abortion funding cases stand for the proposition that the state cannot refuse to make grants to an organization that encourages or performs abortions if those abortion related funds are derived from nongovernmental sources." *Student Government v. Bd. of Trustees,* 868 F.2d 473, 481 (1st Cir. 1989).[9]

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[9] Assuming that *Student Government v. Bd. of Trustees,* 868 F.2d 473 (1st Cir. 1989) is controlling, as Judge Torruella argued in his dissent to the panel opinion, that opinion does not change our holding. *Student Government* stands for the proposition that the government may stop funding of activities that it is not required to fund based on the content of the activity. That holding is consistent with, and in fact relies upon, *McRae* and the other abortion funding cases. But *Student Government* is significantly different from the position urged here by the government. It did not involve any limitation upon the exercise of first amendment rights, only a limitation on the funding of those rights. In addition, it did not place any limitation on the use of private

By not only refusing to fund abortions, but also restricting nongovernmental money that may be used for abortion services, these regulations create an additional obstacle in the exercise of a woman's right to reproductive choice.

VI. OTHER COURT DECISIONS ON TITLE X FUNDING

Other courts have declared unconstitutional the obstacle to abortion created by government limitations upon the flow of information. In *Planned Parenthood Assoc. v. Kempiners,* 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds,* 700 F.2d 1115 (7th Cir. 1983), *aff'd on reh'g,* 568 F. Supp. 1490 (N.D. Ill. 1983), the court held that a state statute denying funding to programs directed at problem pregnancies solely because such programs offered abortion counseling and referral unconstitutionally interfered with a woman's right to reproductive choice. The court stated:

> The state may seek to encourage women to make a voluntary and intelligent decision not to terminate their pregnancy, but it may not seek to encourage women to make this decision in ignorance. In *Maher* and *McRae,* the State merely declined to subsidize abortion. It did not seek to preclude women from making an independent and knowing bearing choice. Here, the state does seek to impair the intelligence and independence of the woman's choice. That goal is constitutionally impermissible, and the state may not make funding choices on such impermissible bases.

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money to fund the activities that the government would no longer support. Finally, the result of *Student Government* was that the government would not fund certain activity, rather than as here, that agency clients will be affirmatively misled.

531 F. Supp. at 329 (citation omitted). Similarly, in *Planned Parenthood Fed. of America,* 680 F. Supp. 1465, a Colorado federal district court enjoined the enforcement of the regulations currently before us, holding *inter alia,* that the regulations violated a woman's right to decide whether to terminate her pregnancy by restricting the flow of information necessary to make that decision: "Restricting a woman's only means of access to vital information renders her right to decide whether to have an abortion largely illusory." *Id.* at 1475.

The circuit court in *Webster* decided a similar issue, and reached a similar conclusion which was not appealed to the Supreme Court. *Reproductive Health Servs. v. Webster,* 851 F.2d 1071 (8th Cir. 1988). The Eighth Circuit declared unconstitutional the prohibition in the Missouri abortion regulation statute against the use of public funds, employees or facilities to encourage or counsel a woman to have an abortion. The court rejected the state's reliance upon *Maher* and *McRae:*

> We think that the state's analogy of its ban on 'encouraging or counseling' to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.
>
> This state-created obstacle to exercise of the right to choose an abortion thus is far-removed from a state's refusal to remove obstacles not of its own crea-

> tion . . . . We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision. We therefore affirm the district court's judgment that the state's ban on "encouraging or counseling" is an unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment.

Id. at 1080.[10]

We recognize that the Court of Appeals for the Second Circuit has upheld the same regulations that are challenged here. *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989). That court relied heavily on *Webster's* reaffirmance of *McRae* and *Maher*. As we have noted, we do not think that those cases require reversal here. Our fundamental disagreement with the majority in *New York v. Sullivan* stems not from a different reading of Supreme Court cases, but rather from our different reading of the language of the regulations. The Second Circuit, it appears to us, ignored the fact that private money ("matching funds") is tied up and held hostage to the same restric-

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[10] Another court has struck down additional HHS regulations that seek to implement the regulations that are at issue here by creating stricter reporting requirements for abortion "advocacy" groups. *Planned Parenthood Federation of America v. Sullivan*, slip op. 88-5565 (E.D.Pa. Dec. 7, 1989). The district court held that the regulations violated Title X and the first amendment. It stated

> [i]t is apparent that that [the] revised [regulations] are no more than a fairly obvious attempt on the part of HHS to circumvent the APA, Title X, and the Constitution, in order to accomplish administratively what Congress could not be persuaded to do and to evade judicial review by issuing substantive rules in the guise of interpretive ones. I hold, therefore, that [the regulations] are illegal and unconstitutional.

Slip op. at 19.

tions as Title X funds because of the new definition of the "Title X program" in the regulations. Its opinion treats the regulations as if they only applied to federal money without also placing significant conditions on matching funds. For this reason the Second Circuit refused to give serious consideration to *Thornburgh* and *Akron*. It distinguished *Akron* and *Thornburgh* on the ground that those cases did not involve public funds, only the regulation of information. *Id.* at 413. But if information restrictions are invalid in general, how can they be valid in the limited situations of public funds? It is axiomatic that the government cannot do indirectly (i.e. through funding decisions) what it cannot do directly.

The Second Circuit's sweeping affirmation of the Secretary's power to write regulations that impose significant burdens on Title X programs and upon the rights of individuals is qualified in two paragraphs at the end of the opinion. These qualifications throw into sharp relief our differences. The first qualification discusses what would arise if a doctor were to treat a "private patient" in a Title X clinic. *Id.* at 413-414. The Second Circuit seemed to feel that this would raise an important issue and that it was not present in these regulations (or at least in the record before the court). We understand the thrust of the new regulations is to prevent exactly that. The regulations prohibit a "private patient" from being treated in a Title X clinic and a doctor in a Title X clinic from having "private patients" treated there. That is the clear intent of the new definitions and the integrity regulations. The majority of the Second Circuit panel ignored this significant limitation imposed by the regulations.

The second qualification in the Second Circuit's opinion (that the regulations are neutral because they limit both "pro and con" advocacy about abortion) was dealt with by Judge Kearse in her thoughtful dissent. The majority

states that the regulations are neutral because they prohibit any discussion about abortion. It is naive to assert that not talking about abortion to a pregnant woman when discussing her options is value-neutral. In addition, the regulations are not even facially neutral because they allow postconceptional counseling in the best interests of the unborn child but not regarding abortion. By discussing only what is best for the unborn child, the counselor has already made the woman's choice. The Government, in restricting the counselor's options to that choice, enforces its choice.

We find that the prohibition in the regulations against counseling or referral with respect to abortion imposes constrainst upon a woman's freedom to make reproductive decisions. This limitation upon a woman's range of choice in deciding whether to carry to term to terminate her pregnancy constitutes a government created obstacle in violation of *Roe v. Wade* and its progeny. The Secretary has gone beyond a mere refusal to fund and has interfered with the decisional process by dictating what information a woman may receive and by intruding into her relationship with her physician. This he may not do. We therefore enjoin the Secretary from enforcing or applying the counseling or referral provisions of the new regulations.

VII. FIRST AMENDMENT ANALYSIS OF THE RESTRICTIONS

The regulations before us forbid, as a condition of receiving funding, certain categories of speech, such as "counseling concerning the use of abortion," and "advocat[ing] abortion as a method of family planning." 42 C.F.R. §§ 59.8, 59.10. Appellees argue that the new regulations not only violate the constitutional right to reproductive choice but also infringe upon the protections

found in the first amendment, relying on *FCC v. League of Women Voters,* 468 U.S. 364 (1984). We agree.

The Supreme Court has made clear that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner,* 374 U.S. 398, 405 (1963). This doctrine is long standing:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It my not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech . . . his exercise of those freedoms would in effect be penalized and inhibited.

Perry v. Sinderman, 408 U.S. 593, 597 (1972).

In determining whether the government may ever so condition a grant or benefit, the Court normally has applied a "strict scrutiny" test, and insisted that the government show a "compelling interest." *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231 (1987) (striking down content-based sales tax exemption for magazines). *See also FCC v. League of Women Voters,* 468 U.S. 364 (1984).

In *FCC v. League of Women Voters,* the Court held that the government may not give federal funds to public radio and television stations upon the condition that the stations not engage in editorializing. The Court noted that the editorial ban was "defined solely on the basis of the

content of the suppressed speech," it constituted a pure example of speech regulation "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues," and the government could satisfy its asserted interests (not using taxpayer money to promote views with which taxpayers may disagree or to promote government propaganda, and preventing the capture of stations by private interest groups) in "less restrictive" ways. *Id.* at 383-84.

For reasons that are similar, or even more compelling, the Title X regulations violate the first amendment. First, the need to protect the speech at issue here is even more important than public radio editorializing. The speech involves informing a woman about the existence of a health and privacy related activity in which she has a constitutional right to engage. Moreover, in context it is far less likely here than in the case of radio editorializing that a member of the relevant public will be adequately exposed to the relevant message content elsewhere. Given the educational and social handicaps of the women who depend upon Title X clinics, they may not learn much about the "pro/anti abortion" considerations elsewhere; and, in any event, they are likely to attach special importance to what a doctor tells them at a family planning clinic. At the same time, the regulations do not create "content-neutrality." Rather, they slant the content of the relevant counseling in an "antiabortion" direction; they insist that the doctors include on any list of "referrals" for prenatal, social service, or emergency medical services all "available provides who do not provide abortions," but they must exclude any provider "whose principal business is the provision of abortions." 42 C.F.R. § 59.8. *See Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 537-38 (1980) (first amendment is hostile to content-based regulation, and such regulation is approved only in certain

narrow circumstances). In addition, the prohibited speech will often involve communications between a patient and doctor, an area (given the "life" and "liberty" interest potentially involved) warranting particularly strong protection. *Akron*, 462 U.S. at 445 (state must not put physician in a "straightjacket"); *Thornburgh*, 476 U.S. at 762-63.

Second, the regulations impede the fund recipient from engaging in the protected activity no less than the statute the Court struck down in *League of Women Voters, supra.* The federal funds in *League of Women Voters* amounted to about 25% of the total income for all public broadcasting stations. *Id.* at 390 n.19, 407. *In this case they can be much less.*[11] Moreover, the regulations require that any forbidden counseling activity must be "physically and financially separate" from any Title X project activity. These facts show that the regulations directly restrict the use of a significant amount of private money (the 10% or more that the private organizations spend within the Title X program). They also strongly suggest that family planning organizations typically mix their own funds with federal funds to build and to operate a single building or set of rooms, say, within a hospital. How then, without incurring impractically high, extra costs, could family planning clinic operators build separate rooms, entrances, or buildings solely for the purpose of taking a patient in the midst of family planning, moving her to a separate place,

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[11] The federal funds in this case, by statute cannot amount to more than 90% of the funds available for a Title X family planning profect; but the government, at oral argument, said that the federal government provides only about 50% of the money supporting federally funded family planning projects; and affidavits in the case show that some family planning organizations receive as little as 9% of their total operating budget from Title X.

and counseling her about the availability of abortions? The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money. At the least, it seems no easier here for a family planning organization to build its own private clinic to counsel abortion than for a federally funded public radio station to build its own separate, non-federally funded public radio station to editorialize. The government has said nothing that would make any contrary view plausible.

Third, the only "governmental interest" that the regulations seek to further is the government's interest in making certain its own money is not spent for a purpose outside the scope of its funded program.[12] But, the government could easily withdraw the "physically separate" facilities requirement, make the "counseling" regulations less slanted, and provide various forms of "bookkeeping" rules. These "less restrictive alternatives" would be as likely to prove effective here as in *League of Women Voters.* Regardless, the Supreme Court has frequently held that the government cannot prevent even its direct employees from exercising their First Amendment rights, even on the *government's time. See Rankin v. McPherson,* 483 U.S. 378 (1987) (state may not discharge employee for exercise of free speech during work hours). That the government cannot restrict privately financed, unusually important, speech activities simply to achieve an ironclad guarantee that its funds are not "improperly spent" would seem to follow *a fortiori.*

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[12] We note that a report issued by the Comptroller General in 1982 found no evidence that Title X funds were used by any of the grantees to provide abortions or to advise clients to have abortions. *See* Report by the Comptroller General for the United States (Sept. 24, 1982), *reprinted in* J.A. at 125, 127.

Fourth, in *League of Women Voters,* the Court found a violation of tne First Amendment, even though it did *not* use a "strict scrutiny/compelling interest" standard. It did not use this standard in light of what it saw as an unusually strong government interest in regulating broadcasting. Here there is no such interest; to the contrary, privacy interests suggest an unusually strong interest in *not* regulating. Hence, there is no reason not to use the normal "strict scrutiny" tests; and the result here should therefore follow *a fortiori.*

The Secretary argues that the denial of funding for activities that "encourage, promote or advocate abortion as a method of family planning," section 59.10(a), reflects a legitimate decision, under the principles set forth in *Regan v. Taxation with Representation of Washington,* 461 U.S. 540 (1983), to refuse to subsidize lobbying. *Regan* involved a challenge to a provision of the tax code that stated that contributions to nonprofit organizations engaging in lobbying would not be tax-deductible. The Court held the provision constitutional, stating that Congress has no obligation to fund advocacy activities. *Id.* at 546.

The regulations before us differ in a significant respect from those considered in *Regan.*[13] By prohibiting advo-

[13] Had we not found that the physical and financial separation requirements imposed by section 59.9 violate Congress' intent to foster coordinated family planning services, *see supra* at 12-14, we would nevertheless be required to strike them down on constitutional grounds. The requirements impose a greater burden on Title X grantees than those considered by the Court in *Regan.* We illustrate briefly. Under the provisions of the Internal Revenue Code, an organization need show only separate incorporation and record keeping vis-a-vis its lobbying affiliate in order to qualify for tax deductible contributions. The Court found those requirements "not unduly burdensome." *Regan,* 461 U.S. at 544-45 n.6. But should §§ 59.9 and 59.10 be enforced as written, a Title X grantee would be subject to

cacy related to abortion, the regulations impose a rstriction that is both viewpoint and content-based in violation of the first amendment. The *Regan* Court explicitly stated that its holding did not endorse funding decisions calculated to suppress specific ideas: "The case would be different if Congress were to discriminate indiviously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan,* 461 U.S. at 548 (quoting *Cammarano v. United States,* 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall,* 357 U.S. 513, 519 (1958)). The Court further distinguished an unlawful attempt to suppress "dangerous ideas" from the clearly lawful decisions in *McRae* and *Maher* to fund certain activities differentially in accordance with a conception of the public interest. *Regan,* 461 U.S. at 549-50.[14]

The new regulations fall squarely on the unconstitutional side of the line drawn in *Regan.* Section 59.10 does not merely prohibit lobbying by a recipient organization; it prohibits *abortion-related* advocacy. The Court has held repeatedly that the government may not prohibit speech on the basis of "its message, its ideas, its subject matter, or

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much more stringent regulation. Under section 59.9, the Secretary will consider not only the existence of separate bookkeeping, but also the separation of physical facilities and personnel, in determining whether a grantee is tainted by prohibited activities. On a practical level, this requirement is significantly more onerous than the purely paperwork requirements at issue in *Regan.*

[14] Unlike this case, however, as the *Regan* Court noted, it was easy for the charities wishing to engage in lobbying to use separate incorporation and accounting methods simply to make certain that the "tax deductible" contributions did not pay for the lobbying activities. The HHS regulations here specifically forbid the Title X organization to do this. Moreover, the regulations here are not content neutral; and, as previously pointed out, the speech here is unusually significant. In any event, the Court, in *League of Women Voters,* distinguished the earlier case in *Regan*; and we must follow the later of the two.

its content." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). Section 59.10 violates the prohibition by attempting to suppress pro-choice advocacy. The Secretary argues that the regulations are not viewpoint-based because they prohibit *all* advocacy concerning abortion, whether in support of or in opposition to the availability of abortion as a method family planning. We find that argument factually untenable. The examples of prohibited activities listed in section 59.10(b), and reproduced in Appendix B, all concern actions that *promote* abortion; not one example concerns anti-abortion advocacy. But even were we to accept the Secretary's interpretation, the regulations would still fall as a content-based regulation: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980). Through the medium of funding, the Secretary has attempted to limit public discussion on abortion rights. It is by now black letter law that such a restriction is a violation of the first amendment.

VIII. SEVERABILITY

In his dissent to the panel opinion, Judge Torruella argued that we should strike down the most pernicious aspects of the regulations[15] but leave the rest of the regulations intact, asserting that the offending portions are severable. His analysis of the offending sections was cogent and to the point. Much of his discussion of the innocuous or permissible aspects of the regulations assumed severability. Having carefully considered his arguments,

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[15] He invalidates § 59.9 (physical separation); § 59.2 (definitions); and § 59.8 (2) (referral to pro-life services)

we do not agree that the offending portions of regulations can be so easily detached. We find, as the Court found in *Thornburgh*, "the radical dissection necessary would leave [the statute] with little resemblance to that intended by the legislature." *Thornburgh*, 476 U.S. at 764; *see also Akron*, 462 U.S. at 445 n.37.

In examining severability a court must examine the functional independence of the valid and invalid provisions and the intent of the enacting legislature. *Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1124, 1136 (1st Cir. 1985). Judge Torruella would have struck the definition section that is the basis for the rest of the regulations. The regulations draw their power from the broad definition of a Title X program. Without the definition, none of the regulations are the same. Striking the definitional section of the regulations, but not the regulations themselves, eviscerates the guiding intent of the regulations and completely changes their meaning. This we cannot do.

All of the information before us leads us to believe that the Secretary intended that the regulations should be considered as a whole and that the Secretary would prefer that they be considered as a whole. There is no severability clause in the regulations creating a presumption of non-severability. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). In addition, the Secretary has never argued, as far as we can tell, that the regulations are severable. He certain does not so argue in his brief. Severability was not argued below or before us in either case. Judge Torruella argued that severability is appropriate because if we strike the entire scheme of regulations "Title X programs [are given] free reign . . . to support or promote abortion as is deemed fit." But he ignored the fact that under the old regulations Title X programs could not promote abortion. *See also* Supp. Brief of NFPRHA

21 n.12 (discussing what they think would happen if we struck the regulation). Of course, in addition, all Title X programs would still be bound by the statutory prohibition found in § 1008. Based on our reasoning, and that of Judge Torruella, certain of the regulations are unconstitutional. We find that the regulatory scheme is such that the offending regulations cannot be severed.

IX. CONCLUSION

For the reasons stated above, we enjoin the enforcement of the new regulations.

Affirmed.

Costs awarded to appellees.

APPENDIX A

The relevant provisions of the new regulations provide as follows:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion. . . .

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation on program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred to appropriate prenatal and/or social services by furnishing a list of avail-

able providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral apointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective in-

tegrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 ***Prohibition on activities that encourage, promote or advocate abortion.***

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

APPENDIX B

Section 59.10(b) provides, in relevant part:

§ 59.10 ***Prohibition on activities that encourage, promote or advocate abortion***

. . . .

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

CAMPBELL, *Chief Judge* (Concurring). I merely add, in joining in my brother's able opinion, that I find Judge Kearse's dissent in *New York* v. *Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) a particularly succinct and persuasive statement in support of the result we reach here. As the Supreme Court in *Roe* v. *Wade* ruled that a woman's right to an abortion was constitutionally protected, I do not see how the government, consistent with the First and Fourteenth Amendments, can deny funding to those who would give objective advice on this constitutionally protected alternative.

TORRUELLA, *Circuit Judge* (Dissenting). In the original panel decision of this case, I concurred in part and dissented in part, based on the assumption that the regulations at issue could be severed from the remainder of the legislation. Since that time, however, my views have been supplemented by the Supreme Court's decision in *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989), and by the Second Circuit's opinion regarding these rules in *New York* v. *Sullivan*, 889 F.2d 401 (2d Cir. 1989). I am now convinced that these regulations, irrespective of whether or not they are subject to severance, do not interfere with any constitutional right protected pursuant to *Roe* v. *Wade*, 410 U.S. 113 (1973), or any First Amendment right as expressed in *F.C.C.* v. *League of Women Voters*, 468 U.S. 364 (1984). In my opinion, the Secretary has merely refused to fund an activity which the government is not constitutionally required to support, without imposing legal obstacles to a citizen's choice of action in a protected area. *Webster, supra*; *Harris* v. *McRae*, 448 U.S. 297 (1980); *Maher* v. *Roe*, 432 U.S. 464 (1977). Nor have plaintiffs' First Amendment rights been inhibited in any constitutionally cognizable way. *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983); *Student Government* v. *Bd. of Trustees*, 868 F.2d 473 (1st Cir. 1989).

I believe that the challenged regulations are a valid exercise of executive power as authorized by Section 1008 of the Public Health Service Act, 42 U.S.C. § 300a-6. Consequently, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1279

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PLAINTIFFS, APPELLEES

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

ERRATA SHEET

The opinion of the Court issued on March 19, 1990 is amended as follows:

On page 2, at the very bottom, add "Judge Conrad K. Cyr has indicated that he does not participate in the consideration and determination of this case."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 88-1279

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PLAINTIFFS, APPELLEES

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

May 8, 1989

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter J. Skinner, *U.S. District Judge*]

Before BOWNES, TORRUELLA and SELYA, *Circuit Judges.*

BOWNES, *Circuit Judge.* This appeal arises out of a challenge to new regulations promulgated under Title X of the Public Health Services Act, 42 U.S.C § 300 *et seq.* by appellant Secretary of Health and Human Services. The contested regulations alter the previous agency interpretation of section 1008 of Title X which provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Prior to the promulgation of the new regulations, the Secretary construed section 1008 to pro-

hibit the use of Title X funds to encourage or promote abortion but to permit the use of such funds to provide nondirective counseling to pregnant women on all available medical and legal options, including abortion. The new regulations reverse that policy by prohibiting any counseling or referral for abortion services and by redefining the scope of Title X projects so as to impose restrictions on privately funded abortion related activities. The district court found that the new regulations represent an abrupt reversal of a longstanding agency policy and it concluded that each of the various provisions either exceeded the statutory authority of the Secretary or infringed upon constitutionally protected activities. The court therefore enjoined the enforcement or application of the regulations. We affirm.

I. STATUTORY AND REGULATORY BACKGROUND

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services. . . ." 42 U.S.C. § 300(a). Title X grantees operate health care facilities offering a wide range of family planning information and services, including contraceptive prescription and counseling, pregnancy testing, counseling on all choices which follow pregnancy, and referrals to other medical service providers.

Title X projects serve an estimated population of 14.5 million women. These women are charged for the services provided on a sliding scale basis, depending on their income and coverage by private or public health care insur-

ance. Under the statute, Title X projects generally receive ninety percent federal funding for covered services, with the remaining ten percent generated by Medicaid and sliding scale fee payments. *See* 42 U.S.C. § 300a-4.

The majority of Title X grantees are public health clinics. Many of these clinics provide abortion facilities on the same site as the Title X project, sharing many of the same staff and resources but relying on nonfederal funds for the abortion-related activities. A report issued by the Comptroller General in 1982 found no evidence that Title X funds were used by any of the grantees to provide abortions or to advise clients to have abortions. *See* Report by the Comptroller General of the United States (Sept. 24, 1982), *reprinted in* Joint Appendix at 125, 127. Under a longstanding agency policy, however, many of the Title X grantees did provide women with abortion counseling and referrals. This longstanding agency policy is embodied in the Program Guidelines issued by the Department of Health and Human Services (HHS) in 1981 which require the provision to pregnant women of "nondirective" counseling and referrals on alternative courses of action, such as prenatal care and delivery, infant care, foster care, adoption and abortion. *See* Program Guidelines for Project Grants for Family Planning Services (1981), *reprinted in* Joint Appendix at 71, 85.

On February 2, 1988, the Secretary promulgated the superseding regulations which are at issue in this case. The relevant provisions are set forth in Appendix A. These regulations significantly alter the previous agency interpretation of Title X by prohibiting nondirective abortion counseling or referral and by enlarging the degree of financial and physical separation required between federally and nonfederally funded activities conducted by a Title X grantee. Our analysis of the new regulations follows.

Section 59.2 redefines the term "family planning" to refer solely to "preconceptional" services. Due to this revision, Title X funds are no longer available for pregnancy or post-partum services. Moreover, section 59.2 redefines the terms "Title X program" and "Title X project" to include not only grant funds but also "grant-related income or matching funds." By virtue of this change, the extensive prohibitions against counseling, referral and abortion-related activities apply broadly to recipient generated income as well as to federal funds.

Section 59.8 reverses the preexisting policy of nondirective counseling. Subsection 59.8(a)(1) prohibits counseling or referral for abortion as a method of family planning. Subsection 59.8(a)(2) provides that all Title X clients diagnosed as pregnant must receive "a list of available providers that promote the welfare of mother and unborn child" as well as information "necessary to protect the health of the mother and unborn child." In an emergency situation, a Title X project may refer a client to a provider of "emergency medical services." Subsection 59.8(a)(3) cautions that a Title X project may not circumvent the prohibition against abortion counseling or referral by employing the list of referrals "as an indirect means of encouraging or promoting abortion as a method of family planning." And subsection 59.8(a)(4) provides that, although a Title X project may provide information which is medically necessary to assess the relative risks and benefits of varying contraceptive methods, that information may not include the counseling or promotion of abortion.

Section 59.9 dictates that Title X projects by "physically and financially separate" from projects providing proscribed activities or information. It states that projects must have "an objective integrity and independence" which reaches beyond separate bookkeeping to include

separation of accounting records, facilities and personnel and to require separate signs for the federally and nonfederally funded activities.

Finally, section 59.10 lists a series of prohibited activities including lobbying for pro-choice legislation, providing speakers to promote the availability of abortion, paying dues to groups which advocate abortion and engaging in legal action or developing and disseminating materials to promote abortion as an option in the case of an unintended pregnancy.

II. PROCEEDINGS BELOW

Appellees filed suit for declaratory and injunctive relief in federal district court on February 2, 1988. Appellees include the Commonwealth of Massachusetts, the National Family Planning and Reproductive Health Association (NFPRHA) and the American Public Health Association. The district court allowed the intervention of Mary Moe, a low-income woman dependent upon a Title X project for her health care needs.

In their joint complaint, appellees charge that the new regulations reverse a consistent and longstanding agency interpretation of Title X without any justification, that they exceed the authority of HHS under the statute, and that they violate the constitutional rights of Title X grantees and their clients. Following their complaint, appellees filed a motion for preliminary injunction on February 9, 1988, alleging that implementation of the regulations would undermine seriously the quality and character of the Title X program. The Secretary opposed the motion for a preliminary injunction and moved that the action be dismissed, or, in the alternative, that summary judgment be granted.

The district court held a hearing on February 18, 1988, and issued a final decree on March 3, 1988, consolidating the preliminary injunction with a decision on the merits.

In its memorandum, the court addressed both the statutory and the constitutional issues. The court considered the various sections of the new regulations independently and found each of the provisions problematic. The court first found that the prohibition on abortion counseling and referral exacted a penalty for the exercise of protected speech. It also found that the prohibition constituted a content-based restriction unsupported by a compelling government interest. The court therefore enjoined the enforcement of section 59.8 on first amendment grounds. The court then considered the restrictions on lobbying and advocacy. It found that section 59.10 had a more far-reaching effect than a mere refusal to subsidize. In light of the restriction on the use of nonfederal funds and the requirement of complete financial and physical separation contained in sections 59.2 and 59.9, the court held that the Secretary had imposed an unduly burdensome requirement on Title X grantees which was not narrowly tailored to meet the legitimate goal of not subsidizing advocacy. The court further found that section 59.10 constitutued a content-based restriction that violated the first amendment and it enjoined the enforcement of that provision. In addition, the court enjoined the enforcement of section 59.9, finding that the physical and financial separation requirement violated the congressional intent to create coordinated family planning services. And finally, the court concluded that the restriction imposed by the new regulations on the flow of neutral information concerning abortion to pregnant women violated the right to privacy as established in *Roe* v. *Wade*, 410 U.S. 113 (1973). This appeal ensued.

III. STATUTORY ANALYSIS

In light of the established principle that courts should not decide constitutional questions unless unavoidable, *see*,

e.g., *Harris* v. *McRae*, 448 U.S. 297, 307 (1980) (quoting *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944)), we begin our analysis with an inquiry into whether the new regulations exceed the Secretary's authority under Title X. Our review of this question is governed by the standard of statutory construction set forth in *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102 (1980). In that case, the court identified four factors to be considered in ascertaining congressional intent: (1) the language of the statute, (2) the contemporaneous legislative history, (3) any subsequent legislative history and (4) agency interpretation(s) of the statute. Under *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), if the above four-part analysis does not reveal clearly the legislative intent, then deference to the agency interpretation of the statute is appropriate *if* the agency interpretation "is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). We are mindful, however, of the caveat issued in *I.N.S.* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n. 30 (1987), that less deference is due to an agency's position when that position is inconsistent with a prior consistently held agency view. With the above guidelines in place, we turn to the statute itself.

1. *Statutory Language*

The language of section 1008 of Title X provides the starting point for our analysis. That provision states: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Appellees contend that the language of this provision is clear. They argue that the ordinary meaning of the words in the statute prohibits only the funding of the *provision* of abortions and that the prohibition does not reach the funding of abortion coun-

seling or referral. Appellees also contend that the prohibition of section 1008 only applies to programs funded by Title X and may not be extended to prohibit abortion activities funded privately by a recipient organization. The Secretary disputes that reading and argues that the new regulations are consistent with the language of the statute. He contends that, although the previous policy of HHS permitted Title X grantees to provide nondirective counseling which did not encourage or promote abortion, the new regulations more closely follow the prohibition of section 1008 by recognizing the importance of counseling and referral to family planning and by prohibiting any abortion-related activity in those areas. The Secretary further argues that the prohibition on abortion stated in section 1008 limits the statutory language favoring integration and coordination of family planning services and that the program separation requirements of the new regulations are therefore consistent with the statute.

We find the statutory language inconclusive. The prohibition in section 1008 is phrased broadly and is susceptible of many differing interpretations. *Accord* Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, Division of Public Health Grants and Services, to Louis H. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971), *reprinted in* Joint Appendix at 108. It is not enough for appellees to show that the statutory language does not expressly forbid counseling and referral or mandate complete physical and financial separation. The Secretary's construction does not contravene the express language of the statute itself. We must therefore look beyond the exact wording of section 1008 to assess the meaning of the statute. *Accord Planned Parenthood Federation of America* v. *Bowen*, 680 F. Supp. 1465, 1468 (D. Colo. 1988); *New York* v. *Bowen*, Nos. 88 Civ. 0701 and 88 Civ. 0702, slip op. at 9 (S.D.N.Y. June 30, 1988).

2. *Legislative History*

We turn to the legislative history of Title X. Appellees argue that Congress intended to provide a full range of information to Title X project clients and to coordinate *all* family planning services. The Secretary argues that Congress intended to fund only *preventive* family planning and that the new regulations are therefore more consistent with the legislative intent than the previous agency mandate for nondirective counseling.

We find the legislative history inconclusive. The statement of purpose in the House Report preceding the passage of Title X stressed the importance of supplying both family planning services and a full range of family planning information and of developing a comprehensive and coordinated program. H. Rep. No. 1472, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068. The Conference Report stated that funding would be used only to support preventive family planning, H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081, but it softened that language with the caveat that Title X programs should be fully coordinated with state and local programs: "The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation." *Id.* at 5082.

We agree with the district court that the only provision of the new regulations which clearly violates congressional interest as manifested in the legislative history is the requirement set forth in section 59.9 of physical and financial separation. Appellees submitted numerous affidavits which avowed that, given the preexisting coordination of family planning services, the new regulations would require many clinics either to give up their Title X funding or

to terminate family planning services altogether. *See, e.g.*, Affidavit of Leslie Tarr Laurie, Executive Director of Family Planning Council of Western Massachusetts, *reprinted in* Joint Appendix at 40, 41; Affidavit of Diane M. Booth, Executive Director of Planned Parenthood of Central Missouri, *reprinted in* Joint Appendix at 55, 57; Affidavit of Karen Cody Carlson, Executive Director of Planned Parenthood of Greater Kansas City, *reprinted in* Joint Appendix at 61, 63; and Affidavit of Mary Russell, Director of Family Planning for Action for Boston Community Development, *reprinted in* Joint Appendix at 213, 215. That result would undermine the clearly expressed legislative intent to expand the level of family planning services provided to low-income women. We endorse the district court's conclusion that the promulgation of section 59.9 exceeds the Secretary's authority and we enjoin its enforcement.

3. *Subsequent Legislative History*

Because the contemporaneous legislative history does not directly address the issues of abortion counseling and referral and lobbying and advocacy, we turn to subsequent legislative history for guidance. We are aware of the long-standing principle that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' *United States* v. *Price*, 361 U.S. 304, 313 (1960), quoted in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963)." *Consumer Product Safety Comm'n*, 447 U.S. at 117-18 (footnote omitted). And, we recognize that subsequent legislative *history* provides an even shakier ground than subsequent legislative *action* from which to infer original intent. *Id.* at 118 n. 13. Nonetheless, the Court has held that the inaction of a subsequent Congress may signal acquiescence to an agency interpretation. In *Haig* v. *Agee*, 453 U.S. 280 (1981), for ex-

ample, the Court found that the amendment of one statute, considered in light of the failure to amend another related statute under which the Secretary of State had asserted broad powers, indicated congressional acquiescence to the administrative construction of the unmodified statute. *Id.* at 300-01 (citing *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965)). *Accord North Haven Board of Education* v. *Bell*, 456 U.S. 512, 534-35 (1982). In *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), the Court stated that congressional inaction in the face of agency action on a subject of heated national interest and debate merited additional consideration and weight. In that case, the Internal Revenue Service (IRS) had changed a longstanding policy and issued a new ruling that denied tax-exempt status to private schools practicing racial discrimination. The Court upheld the agency ruling, stating:

> [F]ew issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

Id. at 599.

Appellees analogize this case to the factual situation in *Bob Jones University*. They contend that the failure of Congress to amend section 1008, despite repeated amendments, reauthorizations and reenactments of Title X, indi-

cates acquiescence to the agency's preexisting policy of requiring nondirective counseling as provided for in the 1981 Program Guidelines. Appellees argue that this congressional inaction merits additional weight, under the principle of *Bob Jones University*, due to the volatility and importance of the national controversy over abortion rights. We note that the Colorado federal district court found this argument persuasive in its analysis. *See Planned Parenthood Federation of America*, 680 F. Supp. at 1472 ("Congressional refusal on repeated occasions to change its policy permitting the neutral dissemination of information about abortion represents a ratification of said policy.").

The Secretary contests that position on essentially two grounds. First, he argues that the subsequent legislative history of Title X reflects confusion over the scope of the abortion prohibition and that therefore Congress cannot be deemed to have ratified an agency construction which it did not wholly grasp. Second, he argues that, even if we could infer ratification of the previous agency interpretation, such ratification would merely reflect acquiescence to a prior policy – it would not indicate that the Secretary's new policy exceeds his statutory authority.

We find the Secretary's second argument persuasive. Although appellees have stated a strong case for congressional acquiescence, the ratification of one agency policy by Congress does not preclude a change in that policy. In *Bob Jones University*, 461 U.S. 574, the Court cited congressional acquiescence in agency policy as proof that an agency was acting within its statutory authority. Here appellees cite congressional acquiescence to prior agency policy as proof that a change in that policy is beyond the scope of its statutory mandate. The Court rejected similar reasoning in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). In that case, the Court reviewed a decision of the Secretary of

Transportation to rescind a requirement that automobiles be equipped with passive restraints. The Court held that previous congressional support for the passive restraint requirement did not preclude a change in policy: "While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation." *Id.* at 45 (citing *Bob Jones University*, 461 U.S. at 559-602; and *Haig* v. *Agee*, 453 U.S. at 291-300). Similarly, in the present case, congressional support for a narrow reading of the abortion prohibition does not necessarily indicate that the new regulations violate congressional intent. We therefore must consider the final factor listed in *Consumer Product Safety Commission*, 447 U.S. 102, as an aid to establishing congressional intent: the original agency construction of the statute.

4. *Contemporaneous Agency Policy*

The Court has held that "courts should respect an agency's contemporaneous construction of its founding statute. . . . Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (citations omitted). *Accord Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-69 (1980). This deference results from the fact that a contemporaneous construction more likely reflects the intent of the enacting Congress. *See St. Luke's Hospital* v. *Secretary of Health and Human Services*, 810 F.2d 325, 331 (1st Cir. 1987).

Appellees argue that in the present case the agency's contemporaneous and consistent interpretation of section

1008 to permit nondirective counseling and to encourage coordination with local and state family planning services is entitled to substantial deference. The Secretary construes the contemporaneous policy of HHS differently. He argues that the thrust of that policy was a prohibition on any encouragement or promotion of abortion; he further contends that the new regulations remain true to that policy and merely readjust the level at which prohibited encouragement is deemed to commence.

We find the Secretary's position untenable. We agree with both the court below and the Colorado federal district court that the new regulations constitute a radical break from a prior consistent policy permitting nondirective counseling: "[F]rom the time Congress enacted § 1008 in 1970, [the Secretary] consistently interpreted it to permit the neutral dissemination of information about abortion, and the referral upon request to entities which provide abortion." *Planned Parenthood Federation of America*, 680 F. Supp. at 1471. There are three independent interpretations of section 1008 which support our conclusion. First, a 1971 memorandum from the Office of General Counsel to the Deputy Assistant Secretary for Population Affairs states that, although section 1008 should be read broadly to prohibit any encouragement or promotion of abortion, it should not be read so broadly as to impede the coordination of family planning activities. *See* Memorandum from Joel M. Mangel, *supra*, p. 12, Joint Appendix at 110. Second, a report from the Office of the General Counsel to Senior Attorney, Public Health Division, states:

> This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the

> use of abortion as a method of family planning by the Title X-supported program. Under this view, *the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion*, and the collection of statistical data and information regarding abortion *are not considered to be proscribed by § 1008*. The provision of "pregnancy counselling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008.

Memorandum from Elsie Sullivan, Assistant for Information and Education, Office of Family Planning, to Senior Attorney, Public Health Division (Apr. 1, 1978), *reprinted in* Joint Appendix at 113, 114-15 (footnotes omitted) (emphasis added). And finally, the 1981 Program Guidelines issued by HHS specifically require nondirective counseling for pregnant women:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> * Prenatal care and delivery
> * Infant care, foster care, or adoption
> * Pregnancy termination

Program Guidelines for Project Grants for Family Planning Services, *supra*, p. 6, Joint Appendix at 85. The record, therefore, clearly reflects a consistent agency interpretation which permitted nondirective counseling, encouraged coordination of all family planning services and prohibited only active encouragement or promotion of abortion.

We find the contemporaneous agency construction compelling. We cannot conclude on the basis of this evidence alone, however, that the congressional intent is wholly unambiguous. Because Congress has not addressed specifically the question of the scope of the abortion prohibition, we must determine whether the new regulations are a *permissible* construction of Title X. *See Chevron U.S.A.*, 467 U.S. at 842-43. We approach this question mindful of the principle that the conflict between the new regulations and the prior consistently held policy entitles these new regulations to less deference. *See supra* at pp. 10-11.

5. *Deference to the Agency Construction*

The district court found that the Secretary had failed to justify the change in policy embodied in the new regulations. In its opinion, the court held the regulations to a heightened standard of review: "[W]hen an agency decides to change the course of a longstanding administrative interpretation, it must justify its action to a greater degree than when it first promulgates regulations." 679 F. Supp. at 141-42 (citing *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 41-42). We find heightened scrutiny unwarranted.

Motor Vehicle Manufacturers Association holds that when an agency rescinds or modifies a policy, its actions are subject to the same standard of review as that applied to the original promulgation of a policy: the arbitrary and capricious standard. 463 U.S. at 41. The case further states that such review, although narrow, is still broader than that accorded to a refusal to promulgate rules in the first instance:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to

> the proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 41-42. Thus the heightened standard referenced by the district court is adjudged in comparison to a refusal to act, not in comparison to a previous promulgation of rules. *Cf. Heckler* v. *Chaney*, 470 U.S. 82 (1985) (agency refusal to take enforcement action presumptively unreviewable). The standard of review applicable to both original agency action and agency recission or modification of a prior standard requires the agency action to be "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." 463 U.S. at 42. Applying this standard to the case at bar, we must decide whether the Secretary has provided a "reasoned analysis" for the change in agency policy.

The Secretary advances two bases for the new regulations. *See* 53 Fed. Reg. 2922 *et seq.* (Feb. 2, 1988), *reprinted in* Joint Appendix at 169. First, he argues that the new regulations more closely conform to the language of section 1008. *See* 53 Fed. Reg. at 2923. But that argument is unacceptable, we have already found that the statutory language is ambiguous and susceptible to differing interpretations. *See supra* at pp. 11-12. Second, the Secretary argues that, even if not mandated by the express language of section 1008, the new regulations more "faithfully and effectively" implement the abortion prohibition. 53 Fed. Reg. at 2923. The Secretary cites reports by the Office of the Inspector General (OIG) and the General Accounting Office (GAO) to support his assertion that Title X projects required guidance "to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.*.

The referenced reports provide a very slim reed of support. Both reports found that Title X grantees were aware of and acted in accordance with the prohibition against the encouragement or promotion of abortion. The GAO summarized the agency's construction of that prohibition as follows:

> Based on HHS' legal opinions, the following types of activities related to abortions are allowable under title X programs. Recipients *may:*
>
> —provide information about abortion services;
>
> —provide the name, address, and telephone number of abortion providers;
>
> —collect statistical data and information regarding abortion;
>
> —inspect facilities to determine their suitability to provide abortion services; and
>
> —pay dues to organizations that advocate the availability of abortion services.
>
> Recipients *may not*
>
> —provide counseling that encourages a person to obtain an abortion,
>
> —provide transportation to an abortion center or provider,
>
> —provide proabortion speakers to debate the issues in public forums,
>
> —advocate the need and suitability of abortion service in the community,
>
> —produce or show movies that tend to encourage or promote a favorable attitude toward abortion,

- provide abortion as a suitable backup method of family planning,
- make specific appointments or referrals for an abortion unless medical conditions warrant,
- bring legal action to liberalize abortion-related statutes, and
- pressure local governing bodies to change restrictive abortion policies.

Report by the Comptroller General (Sept. 24, 1982), *reprinted in* Joint Appendix at 125, 144-45. The two reports did suggest, however, that the Secretary should clarify the agency's preexisting policy position on abortion-related activities. The GAO report further suggested that, given the sensitivity of the abortion controversy, the agency might look to Congress for any further guidance on the scope of the abortion prohibition.

Read literally, the OIG and the GAO reports call only for a clarification of existing standards. The Secretary construes the reports more broadly and argues that the suggestion of clarification provides support for the promulgation of wholly new and modified regulations. Were we to apply a heightened standard of review, we well might find the Secretary's rationale lacking; however, our scope of review is narrow. We must " 'uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.' " *Motor Vehicles Manufacturers Ass'n*, 463 U.S. at 43 (quoting *Bowman Transportation* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974)). We may not apply a heightened scrutiny to the actions of the Secretary in order to avoid the more difficult constitutional issues raised by the abortion controversy. *Cf. Roe* v. *Wade*, 410 U.S. at 116 ("We forthwith acknowledge our

awareness of the sensitivity and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.") Although these facts present a very close case, we cannot say that the Secretary has failed utterly to provide a reasoned basis for change. We must defer to the agency construction of the statute.

6. *Conclusion*

Our examination of the traditional elements of statutory construction yields the following results. We find the plain words of the statute to be susceptible to differing interpretations. We find the contemporaneous legislative history inconclusive, except on the issue of program coordination. We find that the subsequent legislative history indicates congressional acquiescence in the previous agency policy promoting nondirective counseling, but that this acquiescence does not preclude a change in agency policy. And finally, because of the deference due an agency's interpretation of an enabling statute, we cannot say that the Secretary's new policy is impermissible. We turn therefore to the constitutional questions presented by the new regulations.

IV. THE RIGHT OF REPRODUCTIVE CHOICE

Appellees argue that even if the regulations do not violate the mandate of Title X, they nonetheless must fall as an unconstitutional encroachment upon a woman's right to make an informed decision concerning abortion. Appellees contend that the regulations violate *Roe* v. *Wade,* 410 U.S. 113, and its progeny both by restricting the provision of information to a Title X client requesting counseling on her pregnancy and by restricting the permissible contours of the physician-patient relationship in a Title X project. The Secretary refutes that contention by bald assertion rather than by analysis. He cites *Maher* v. *Roe,* 432 U.S. 464 (1977), and *Harris* v. *McRae,* 448 U.S. 297, for the proposition that the regulations merely implement a funding decision to support childbirth over abortion and that the regulations impose no obstacle whatsoever to a woman's choice between those alternatives. We find the Secretary's reliance on *Maher* and *McRae* misplaced. The new regulations do pose a significant obstacle to a Title X client's decision to terminate her pregnancy by curtailing her ability to receive counseling on abortion from the physician responsible for her medical care. We therefore find the new regulations unconstitutional. Paraphrasing the recent decision of the Court in *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), we find:

> The [federal government is] not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellant[ ] claim[s] that the [regulations] before us today further legitimate compelling interests of the [government]. Close analysis of those [regulations], however, shows that they wholly subordinate constitutional privacy interests and concerns with mater-

> nal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.

Id. at 759.

We begin with the proposition that the Constitution protects independence in making "certain kinds of important decisions." *Whalen* v. *Roe,* 429 U.S. 589, 599-600 (1977) (footnote omitted). That protection extends to decisions concerning both childbirth and the termination of a pregnancy. *See Roe* v. *Wade,* 410 U.S. 113; *City of Akron* v. *Akron Center for Reproductive Health,* 462 U.S. 416 (1983); *and Thornburgh,* 476 U.S. 747.

To ensure independence in a woman's decisionmaking, the Court has rejected government attempts to intrude into the dialogue between a woman and her physician. In *Akron* and *Thornburgh,* the Court invalidated informed consent provisions designed to influence a woman's choice between childbirth and abortion, reaffirming a woman's right "in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the state.' " *Akron,* 462 U.S. at 429-30 (quoting *Roe* v. *Wade,* 410 U.S. at 163) (footnote omitted).

City of Akron v. *Akron Center for Reproductive Health,* 462 U.S. 416, involved a city ordinance which required, *inter alia,* that a woman's physician make specified statements prior to performing an abortion in order to ensure that the woman's consent was "truly informed." *Id.* at 423. Those statements included information on the stage of the woman's pregnancy, the development of the fetus and the date of its possible viability, the physical and psychological complications of an abortion procedure, and the availability of agencies to provide assistance with birth control, prenatal care, childbirth and adoption. The Court found the ordinance unconstitutional for two "equally decisive" reasons. *Id.* at 445. First, it stated that

the ordinance required the provision of dubious "facts" in order to manipulate a woman's choice between childbirth and abortion: "[I]t is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* at 444. Second, the Court found that, by requiring a physician to provide specified information to a client, the ordinance placed a physician in an " 'undesired and uncomfortable straitjacket.' " *Id.* at 445 (quoting *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 67 n.8 (1976)). It concluded: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.' " *Id.* (quoting *Whalen* v. *Roe,* 429 U.S. at 604 n.33) (footnote omitted).

The Court cited both of those reasons in striking down the informed consent provision at issue in *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747. The Court warned that, although informed consent provisions were not unconstitutional as a general rule, "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Id.* at 760 (quoting *Akron,* 462 U.S. at 443-444). The state statute at issue required, *inter alia,* the provision of printed materials which included a list of agencies offering alternatives to abortion and a description of fetal development. The Court described those materials as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician." *Id.* at 762. The Court explicitly condemned the requirement of a list of agencies providing alternatives to abortion as a distortion of the physician-patient relationship:

> Even the listing of agencies . . . presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. . . . All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

Id. at 762-63 (citation omitted).

The regulations at issue here attempt to structure the physician-patient dialogue and thereby influence a woman's choice between childbirth and abortion even more completely than the informed consent provisions at issue in *Akron* and *Thornburgh*. Not only do the regulations *require* the Title X project to furnish all clients with "a list of available providers that promote the welfare of the mother and unborn child," section 59.8(a)(2), but they also *forbid* Title X projects from providing "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion as a method of family planning." Section 59.8(a)(1). The requirement of the provision of a list of agencies offering prenatal care, standing alone, could well invalidate the new policy. This requirement aims at persuading a woman to opt for childbirth over abortion by presenting limited and biased information and by rendering the decision to abort more difficult. Furthermore, the requirement forces the attending physician to endorse providers which "well may be out of step

with the needs of the particular woman." The listing of agencies does not stand alone, however. By coupling that requirement with a prohibition against nondirective counseling or referral to an abortion provider, regardless of the doctor's judgment concerning the most appropriate medical care or the woman's request for specific information, the Secretary has intruded even further into constitutionally protected decisionmaking.[1]

Read together, the new regulations force all Title X projects to provide incomplete and skewed information and to withhold requested, possibly even medically advisable, information. This policy runs afoul of our holding in *Planned Parenthood League of Massachusetts* v. *Bellotti,* 641 F.2d 1006 (1st Cir. 1981). In *Bellotti,* we invalidated a twenty-four hour waiting period requirement contained in a Massachusetts statute regulating abortions. We held that the requirement constituted "a substantial state-created burden on a woman's fundamental right," *id.* at 1015, unjustified by a compelling state interest. We found that the waiting period posed a substantial burden both because the delay increased the medical risks of abortion and because it imposed ancillary costs upon a woman desiring an abortion:

> [T]he fact that the form must be signed at least 24 hours prior to an abortion necessitates that a woman undertake at least two separate trips to obtain an

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[1] The Secretary contended at oral argument that a physician could include on the list of health care providers the names of agencies which performed abortions so long as such activity was not an agency's "principal business." *See* section 59.8(a)(3). *We find that assertion incredible in light of the requirement that all listed agencies must further "the welfare of the . . . unborn child." Cf. Thornburgh,* 467 U.S. at 769 (rejecting construction of statute which, although rendering it constitutional, "is inconsistent with the statutory language").

> abortion . . . . This effect necessarily imposes burdens in terms of time, money, travel and work schedules; for many women, particularly the poor, the rural, and those with pressing obligations, these burdens will be substantial.

Id. (citations omitted). *Accord Akron,* 462 U.S. at 450-51 (twenty-four hour waiting period invalid because it intrudes upon physician discretion). Both of these burdens are imposed upon Title X clients under the new regulations. By prohibiting nondirective counseling and eliminating all agencies providing abortions from referral lists, the regulations impose substantial delay and additional costs upon a woman desiring to terminate her pregnancy. Some low-income women may be unable to obtain any information on abortion at all without the help of a Title X clinic. For others, the delay between the moment when they learn of their pregnancy and the time they obtain information on abortion may greatly increase the risks inherent in the abortion procedure. Dr. George Morley, president of the American College of Obstetricians and Gynecologists, stated in his affidavit that the delay caused by the new regulations might endanger women by pushing the time of abortion into the second trimester of pregnancy. He explained: "Abortions performed later in pregnancy are closely associated with increased morbidity and mortality risks. For example, although only a small percentage of abortions are performed during the second trimester of pregnancy, they caused approximately half of all abortion-related deaths between 1972 and 1981." Affidavit of George W. Morley, M.D., *reprinted in* Joint Appendix at 27, 30.

Our discussion in *Bellotti* of the Massachusetts informed consent requirement is also informative. The consent form mandated by the statute required a discussion of

the abortion procedure, a description of fetal development and a statement that the decision *not* to abort would not constitute grounds for the denial of public assistance. We found that although the form "comes close to an impermissible intrusion into the physician-patient relation," 641 F.2d at 1017, several factors saved it from invalidity. Most importantly, we noted that the statute did not require a physician personally to read the form to the patient or to verify that she had read it herself, and that a physician could offer any additional information she felt necessary: "[T]he physician remains completely free to give any additional information desired regarding abortion, whether complementary to or contradictory of the information contained in the . . . form." *Id.* at 1017-18 (footnote omitted). That saving characteristic is not present in the new regulations. To the contrary, the regulations prohibit a wide range of additional information. According to Dr. Morley, this prohibition not only endangers the health of the woman, but it also contravenes medical ethics:

> [I]f all a health care professional is able to do in a situation where medical treatment is indicated is to advise the patient of the diagnosis and refer, such a limitation also would violate medical ethics and standards of practice. When a condition warranting treatment is diagnosed, even if referral is required, it is necessary to counsel on all options (including abortion) and make a referral consistent with the patient's informed decision.

Affidavit of Dr. George W. Morley, *supra* p.32, at 32. The regulations, therefore, not only attempt to influence a woman's decision but they also place a straightjacket on the physician, forcing her to depart from accepted standards of practice. The Court explicitly has rejected such regulation. *See Akron,* 462 U.S. at 431 (state may not

regulate in manner which causes departure from "accepted medical practice").

The effect of the new regulations is to infringe upon women's freedom of reproductive choice by denying them access to important information and by interfering with the physician-patient relationship. These encroachments most often occur during the first trimester of pregnancy, when a woman's privacy interests are most unrestricted:

> [F]or the period of pregnancy prior to [the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe v. *Wade*, 410 U.S. at 163. We recognize, of course, that even during the first trimester, a woman's privacy right is not absolute. In *Akron*, the Court held:

> Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives. . . . But even these minor regulations on the abortion procedure during the first trimester may not interfere with the physician-patient consultation or with the woman's choice between abortion and childbirth.

462 U.S. at 430 (citation omitted).

In his brief, the Secretary has neither argued that the regulations advance important health objectives nor refuted appellees' contention that they interfere with the physician-patient dialogue and a woman's freedom of reproductive choice. Rather the Secretary has relied solely on *Maher* v. *Roe*, 432 U.S. 464, and *Harris* v. *McRae*, 448 U.S. 297, claiming that the regulations reflect a valid decision to favor childbirth over abortion. Those cases are inapposite.

In *Maher* v. *Roe,* the Court upheld a regulation promulgated by the Connecticut Welfare Department which limited state Medicaid benefits for first trimester abortions to those which were deemed medically necessary. The Court found that although the regulations may well have rendered childbirth a more "attractive alternative," they imposed no restrictions on a woman's access to abortion and thereby did not infringe upon her constitutional right to reproductive choice. 432 U.S. at 474. The Court explicitly distinguished the regulations under consideration from a government effort to restrict a woman's freedom in decisionmaking: "Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475 (footnote omitted). The Court affirmed that reasoning in *Harris* v. *McRae* in which it upheld an amendment to Title XIX of the Social Security Act which restricted the use of federal Medicaid funds to support certain medically necessary abortions. Citing *Maher,* the Court explained that the amendment created no obstacle to a woman's freedom of choice: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." 448 U.S. at 316.

The emphasis in both *Maher* v. *Roe* and *Harris* v. *McRae* was on preexisting limitations on a woman's access to abortion which the government failed to alleviate through funding. In the instant case, the Secretary's policy does not merely fail to remove obstacles to abortions—it creates obstacles. By insisting upon a one-sided flow of information to Title X clients and by prohibiting the provision of nondirective counseling, the regulations place

significant limitations upon a woman's freedom of reproductive choice. Due to the combination of government compelled disclosures and nondisclosures, a Title X client will make a decision concerning her pregnancy based upon a distorted consultation marred by medically incomplete information and referrals. *Cf.* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment,* 101 Harv. L.R. 1916, 1921-22 (1988) (government sponsored programs prohibited from providing abortion counseling or referral "manipulate the abortion decision itself by deliberately providing distorted information.") (footnote omitted). Both *Maher* and *McRae* emphasize that the contested provisions left the woman's decisional process intact; in the instant case, that process is undermined through a government crafted restructuring of the physician-patient dialogue.

The Court explicitly recognized this distinction between refusals to fund the provision of abortion and incursions upon the decisional process in a juxtaposition of text and footnote in *Akron.* In the body of its opinion, the Court stated that while some informed consent provisions *may* pass constitutional muster, the state could not attempt to direct the flow of information on abortion through such provisions:

> This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to

> influence the woman's informed choice between abortion or childbirth.

462 U.S. at 443-44. In a footnote to this passage, the Court distinguished state provisions designed to effect the decisional process by regulating the flow of information from the provisions at issue in *Maher* and *McRae* which merely provided financial support for a policy choice: "'This legislation to further an interest in preferring childbirth over abortion was permissible . . . only because it did not add any 'restriction on access to abortions that was not already there.' " 462 U.S. at 444 n.33 (citing *Maher*, 432 U.S. at 474).

Regulating the substance of the dialogue between physician and patient in order to influence a woman's decision concerning her pregnancy creates a new and imposing obstacle to abortion. And by conditioning funding of Title X projects upon acquiescence to such regulation, the Secretary has violated the clear prohibition of *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest. . . .

The unconstitutional intrusion upon a woman's decision-making process as a condition of receipt of Title X funding is therefore unlawful.

Other courts have declared unconstitutional the obstacle to abortion created by government limitations upon the

flow of information.[2] In *Planned Parenthood Association* v. *Kempiners*, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *aff'd on rehearing*, 568 F. Supp. 1490 (N.D. Ill. 1983), the court held that a state statute denying funding to programs directed at problem pregnancies solely because such programs offered abortion counseling and referral unconstitutionally interfered with a woman's right to reproductive choice. The court stated:

> The state may seek to encourage women to make a voluntary and intelligent decision not to terminate their pregnancy, but it may not seek to encourage women to make this decision in ignorance. In *Maher* and *McRae*, the state merely declined to subsidize abortion. It did not seek to preclude women from making an independent and knowing bearing choice. Here, the state does seek to impair the intelligence and independence of the woman's choice. That goal is constitutionally impermissible, and the state may not make funding choices on such impermissible bases.

531 F. Supp. at 329 (citation omitted).[3] Similarly, in

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[2] We recognize that one court has rejected a constitutional challenge to the regulations currently before us, relying primarily on *Maher* v. *Roe*, 432 U.S. 464, and Harris v. *McRae*, 448 U.S. 297. *See New York* v. *Bowen*, Nos. 88 Civ. 0701 and 88 Civ. 0702, slip op. at 25-30. We have discussed already the inappositeness of those cases. *See supra* at pp. 34-37.

[3] The court further stated that, if the statute had denied funding solely because a project conducted abortion-related activites with private funds, the denial would constitute an invalid penalty upon constitutional rights. 531 F. Supp. at 325 (citing *McRae*, 448 U.S. at 317 n.19; and *Maher*, 432 U.S. at 474 n.8). Appellees argue that the new policy imposes such a penalty because the broad definition of a Title X project or program in section 59.2 effectively imposes government restrictions on recipient generated funds. We need not reach that issue because we hold that the insistence upon controlling the content of pregnancy counseling and referral constitutes an unconstitutional condition on funding.

Planned Parenthood Federation of America, 680 F. Supp. 1465, a Colorado federal district court enjoined the enforcement of the regulations currently before us, holding *inter alia,* that the regulations violated a woman's right to decide whether to terminate her pregnancy by restricting the flow of information necessary to make that decision: "Restricting a woman's only means of access to vital information renders her right to decide whether to have an abortion largely illusory." *Id.* at 1475. And most recently, in *Reproductive Health Services* v. *Webster,* 851 F.2d 1071 (8th Cir. 1988), the Eighth Circuit declared unconstitutional the prohibition in the Missouri abortion regulation statute against the use of public funds, employees or facilities to encourage or counsel a woman to have an abortion. The court rejected the state's reliance upon *Maher* and *McRae:*

> We think that the state's analogy of its ban on "encouraging or counseling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.
>
> This state-created obstacle to exercise of the right to choose an abortion thus is far-removed from a state's refusal to remove obstacles not of its own creation. . . . We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to

> make a decision. We therefore affirm the district court's judgment that the state's ban on "encouraging or counseling" is an unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment.

Id. at [1080].

We find that the prohibition in the regulations against counseling or referral with respect to abortion imposes constraint upon a woman's freedom to make reproductive decisions. This limitation upon a woman's range of choice in deciding whether to carry to term or terminate her pregnancy constitutes a government created obstacle in violation of *Roe* v. *Wade* and its progeny. The Secretary has gone beyond a mere refusal to fund and has interfered with the decisional process by dictating what information a woman may receive and by intruding into her relationship with her physician. This he may not do. We therefore affirm the judgement of the district court and enjoin the Secretary from enforcing or applying the counseling or referral provisions of the new regulations.

VII. FIRST AMENDMENT ANALYSIS OF THE ADVOCACY RESTRICTIONS

Appellees argue that the new regulations not only violate the constitutional right to reproductive choice but also infringe upon the first amendment. Because we hold that section 59.8 runs afoul of the constitutional guarantee of privacy first recognized in *Roe* v. *Wade*, we need not address appellees' argument that the prohibition on abortion counseling and referral constitutes and unlawful content-based restriction on speech. We do find, however, that the district court correctly enjoined the restrictions on lobbying and advocacy, set forth in section 59.10, as a violation of the first amendment.

The Secretary argues that the denial of funding for activities which "encourage, promote or advocate abortion as a method of family planning," section 59.10(a), reflects a legitimate decision, under the principles set forth in *Regan* v. *Taxation with Representation of Washington,* 461 U.S. 540 (1983), to refuse to subsidize lobbying. *Regan* involved a challenge to a provision of the tax code which stated that contributions to nonprofit organizations engaging in lobbying would not be tax-deductible. The Court held the provision constitutional, stating that Congress has no obligation to fund advocacy activities. *Id.* at 546.

The regulations before us differ in a significant respect from those considered in *Regan.*[4] By prohibiting advocacy related to abortion, the regulations impose a restriction which is both viewpoint and content-based in violation of the first amendment. The *Regan* Court explicitly stated that its holding did not endorse funding decisions calcu-

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[4] Had we not found that the physical and financial separation requirements imposed by section 59.9 violate Congress' intent to foster coordinated family planning services, *see supra* at 12-14, we would nevertheless be required to strike them down on constitutional grounds. The requirements impose a greater burden on Title X grantees than those considered by the Court in *Regan.* We illustrate briefly. Under the provisions of the Internal Revenue Code, an organization need show only separate incorporation and record keeping vis-a-vis its lobbying affiliate in order to qualify for tax deductible contributions. The Court found those requirements "not unduly burdensome." *Regan,* 461 U.S. at 544-45 n.6. But should §§ 59.9 and 59.10 be enforced as written, a Title X grantee would be subject to much more stringent regulation. Under section 5.59, the Secretary will consider not only the existence of separate bookkeeping, but also the separation of physical facilities and personnel, in determining whether a grantee is tainted by prohibited activities. On a practical level, this requirement is significantly more onerous than the purely paperwork requirements at issue in *Regan.*

lated to suppress specific ideas: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' "ai[m] at the suppression of dangerous ideas." ' " *Regan,* 461 U.S. at 548 (quoting *Cammarano* v. *United States,* 358 U.S. 498, 513 (1959) (quoting *Speiser* v. *Randall,* 357 U.S. 513, 519 (1958)). The Court further distinguished an unlawful attempt to suppress "dangerous ideas" from the clearly lawful decisions in *Harris* v. *McRae,* 448 U.S. 297, and *Maher* v. *Roe,* 432 U.S. 464, to fund certain activities differentially in accordance with a conception of the public interest. 461 U.S. at 549-50.

The new regulations fall squarely on the unconstitutional side of the line drawn in *Regan.* Section 59.10 does not merely prohibit lobbying by a recipient organization; it prohibits *abortion-related* advocacy. The Court has held repeatedly that the government may not prohibit speech on the basis of "its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972) (citations omitted). Section 59.10 violates that prohibition by attempting to suppress pro-choice advocacy. The Secretary argues that the regulations are not viewpoint-based because they prohibit *all* advocacy concerning abortion, whether in support of or in opposition to the availability of abortion as a method of family planning. We find that argument factually untenable. The examples of prohibited activities listed in section 59.10(b), and reproduced in Appendix B, all concern actions which *promote* abortion; not one example concerns anti-abortion advoacy. But even were we to accept the Secretary's interpretation, the regulations would still fall as a content-based regulation: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

Consolidated Edison Co. v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980). Through the medium of funding, the Secretary has attempted to limit public discussion on abortion rights. It is by now black letter law that such a restriction is a violation of the first amendment.

VI. CONCLUSION

For the reasons stated above, we enjoin the enforcement of the new regulations.

Affirmed.

Costs awarded to appellees.

APPENDIX A

The relevant provisions of the new regulations provide as follows:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion. . . .

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq*.

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act . . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.8 ***Prohibition on counseling and referral for abortion services; limitation of program services to family planning.***

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with infor-

mation necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

§ 59.9 *Maintenance of program integrity.*

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether

such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 ***Prohibition on activities that encourage, promote or advocate abortion.***

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

APPENDIX B

Section 59.10(b) provides, in relevant part:

§ 59.10 ***Prohibition on activities that encourage, promote or advocate abortion.***

* * * *

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

SELYA, Circuit Judge (concurring). I join in Judge Bownes's lucid opinion, but write separately to highlight two matters. First, with respect to *Student Government Ass'n* v. *Board of Trustees,* 868 F.2d 473 (1st Cir. 1989), I think that the case *sub judice* is governed by the array of Supreme Court precedent marshalled so impressively in the panel opinion. Consequently, our decision today in no way vitiates or contravenes *Student Government Ass'n.* The two opinions, read side by side, each in context, are perfectly consistent.

My second purpose is to state my agreement with the reasoning and conclusions regarding section 59.2 of the regulations so well articulated in Part III of Judge Torruella's separate opinion. *Post* at 55-58. In my view, Judge Torruella's analysis complements that of Judge Bownes, furnishing an alternate, independently-sufficient basis for finding the regulations (or a portion of them) to be constitutionally infirm.

TORRUELLA, Circuit Judge (Concurring in part and dissenting in part). Because I believe, with all due respect, that the majority is subconciously overreacting to the fact that the challenged regulations relate to a neuralgic area of public concern, I must be particularly fastidious in my remarks regarding what I understand this case to be really about. Regardless of what may be the government's alleged motivation in passing these regulations, this case is *not* about the merits of the abortion issue. Until such time, if ever, that we hear otherwise from the Supreme Court, as far as I am concerned *Roe* v. *Wade,* 410 U.S. 113 (1973), is the law of the land and thus is not to be questioned directly or indirectly by judicial manipulations in the lower courts. However, the central issue in this case is otherwise. The issue here is one which has already been definitively decided in this Circuit in *Student Government Ass'n* v. *Board of Trustees of the University of Massachusetts,* No. 88-1261, slip op. (1st Cir. Feb. 21, 1989), in which we ruled that *the government is not required to subsidize the dissemination of information that it opposes, or feels is against the public interest.* I believe that case is controlling on the issues as to which I dissent from the majority holding.

I agree with the majority that, unfortunately, the likely effect of the regulations in question will be to decrease the existing access that some women, primarily young or poor women, will have to information and counseling concerning abortions. Access to information is recognized in our society as incomparably empowering. The First Amendment of the Constitution relies on the simple premise that one cannot *prevent* disfavored views through bans on those views and accordingly we have "eschewed silence coerced by law" and believe that "the fitting remedy for evil counsels is good ones." *Whitney* v. *California,* 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *over-*

ruled on other grounds, Brandenburg v. *Ohio,* 395 U.S. 444 (1969).

Recognizing, however, that government is not required to provide funding for all constitutionally protected activities, we must continue our inquiry under a carefully established constitutional analysis. The examination is necessarily narrowed because our task is not to decide which policies are most in the public interest, as that would usurp functions of the other branches. Rather, we must solely determine if these regulations, and their likely outcome, are permissible and, if not, decide an appropriate course.

I. *The Severability of the Regulations*

While agreeing with certain aspects of the majority's opinion, I am forced to conclude that the majority's approach is too broad, striking down sections of these regulations that are permissible and should stand. Thus, at the outset, I must explain that I believe these regulations can be treated independently, and that severability of the offensive provisions is not only acceptable, but truly required instead of the majority's approach.

One of the seminal cases in the area of severability of regulations is *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607 (1944). Facially, it may appear that *Addison* compels the conclusion that these regulations are not severable and thus, since certain of the regulations are invalid, the entire regulatory scheme must fail. In *Addison,* the Supreme Court held a section of the regulations implementing the Fair Labor Standards Act (FLSA) to be unconstitutional. This section was part of a definition exempting certain employees from the FLSA requirements. The part found objectionable was a section which greatly limited the exemption. Thus, without this

part, the exemption was greatly expanded, lessening the applicability of the FLSA.

The Court decided that the impermissible section, because of its limiting nature, was essential to the remaining definition. Thus, the Court concluded that it was unlikely that the rest of the exemption would have been enacted without this limiting clause. The Court therefore then declared that the sections were not severable.[4]

Recent courts that have examined the question of the severability of regulations have basically followed the standards enunciated in *Addison* and, more recently, in *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976) (dealing with statutory severability). The Supreme Court, just last year, reviewed regulations promulgated by the Secretary of the Treasury to control the importation of certain "gray-market" goods. *K-Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811 (1988). Upon concluding that a subsection of the regulation in question could not stand, the Court decided that severability of the subsection was required as severance would not "impair the function of the statute as a whole, and there [was] no indication that the regulation would not have been passed but for its inclusion." *Id.* at 1819. Thus, the Court basically has adopted the two-part inquiry used by many courts in making statutory severability determinations: an examination of the functional independence of the sections, *see Ragsdale* v. *Turnock,*

[4] It is important to note, however, that even the Court in *Addison* did not simply strike down the entire regulatory scheme Because of their conclusion that the impermissible section was not severable. Instead, the Court concluded that the appropriate disposition was to remand the case "to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." *Addison,* 322 U.S. at 619. As the Court stated, "[n]either logic nor law dictates an 'either-or' conclusion." *Id.*

841 F.2d 1358 (7th Cir. 1988), and of the intent of the enacting agency. *Keith Fulton & Sons* v. *New England Teamsters,* 762 F.2d 1124, 1136 (1st Cir. 1984).

The United States Court of Appeals for the District of Columbia Circuit has held that a determination of the severability of regulations should be based primarily on the intent of the issuing agency. *North Carolina* v. *Federal Energy Regulatory Comm.,* 730 F.2d 790, 795-96 (D.C. Cir. 1984). Only where there is "*substantial* doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper." *Id.* at 796 (emphasis added) (citing *Addison,* 322 U.S. at 618-19).

In this case, we are examining a series of regulations that were added as amendments to the original regulatory scheme. Each section, as well as many of the specific provisions within a section, is functionally independent. Also, it is impossible to infer from the regulations, or from any of the information available concerning their proposal and subsequent enactment, that the Secretary would not have promulgated the remaining regulations without the objectionable provisions. Clearly, there is not "substantial doubt" that these provisions otherwise would not have been enacted. The Secretary promulgated these regulations in order to ensure that government funds would not be spent on activities which in any way encouraged, endorsed, or facilitated a woman's decision to abort a pregnancy. As will become more apparent later in this opinion, even if impermissible sections are severed, these goals still will be furthered. These section place *greater* restrictions on one's access to information about abortion within Title X projects; however, without these provisions, the effect of the remaining scheme of regulations as a whole continues to restrict the use of these funds for impermissible purposes. To strike the entire scheme, as the majority de-

sires, gives Title X programs free reign as to the scope of their family planning services, including the ability to support or promote abortion as is deemed fit. Thus, to strike the entire regulatory scheme is to completely frustrate the goals of the agency charged with administering this program.

If the concern is that the court should not force upon the Secretary regulations with which he does not agree, then I suggest that this problem is easily corrected by allowing the Secretary, if he so chooses, to withdraw the regulations as we have interpreted them. There is no sound reason in this case mandating that we make decisions for the Secretary and the HHS, as to the appropriate scope of Title X, when they themselves can so decide.

Having concluded that severance is appropriate, I will now address each section of the challenged regulations in turn.[5]

II. *Statutory Analysis and Section 59.9: Maintenance of Program Integrity*

I begin by concurring in Parts I-III of the majority's opinion, including the conclusion that § 59.9 is impermissible because it violates Congressional intent. These regulations now, as well as in the past, have tried to ensure that no Title X funds would be spent on prohibited activities (generally those encouraging abortions). Although all available evidence indicates that *no* Title X money had

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[5] I recognize that by concluding that severence is appropriate I will be leaving in piecemeal form many of these regulations. Unfortunately, there is no legitimate "cleaner" way to analyze these sections. Having concluded that these sections are independent and that the program's goals will best be served through severence, separate analysis and disposition are necessary for every section.

in fact been wrongly spent,[6] the amended § 59.9 now requires additional separation between activities, presumably for extra protection against improper expenditures. Separate bookeeping is no longer considered adequate; now there must also be complete *physical* separation between Title X and prohibited activities.

Many existing programs submitted affidavits declaring that they would be unable, under the new separation requirements, to continue both Title X projects and other family planning services. Thus, they would be forced to choose between federal funding or the terminating of family planning services. Title X projects were intended to operate as part of a coordinated and integrated system with other programs funded through other sources. *See Massachusetts* v. *Bowen,* 679 F. Supp. 137, 143-144 (D. Mass. 1988). It is undisputed that the goal of Title X is to increase and improve family planning services to indigents, as well as to enhance and coordinate with existing state and private programs. Also, as found by the lower court, Title X did not intend "to restrict the types of projects with which a . . . recipient could associate, or to place limitations on the physical proximity or the sharing of personnel between Title X projects and unrelated programs which may provide abortion services." *Id.* Clearly, then this new regulation, with its devastating impact on the existence of many programs, violates Congressional intent.

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[6] The National Family Planning and Reproductive Health Association (NFPRHA) testified that neither the audit of the Office of Inspector General nor that of the General Accounting Office found a single violation of Title X under existing regulations. Family Planning Amendments: Hearings on S. 1366 Before the Comm. on Labor and Human Resources, 100th Cong., 1st Sess. 679 (1987) (testimony of Scott R. Swirling, Exec. Director, NFPRHA).

III. ***Section 59.2: Definitions***

I agree with the majority that the last sentence of the definition of "Title X Program" and "Title X Project," which reads "Title X project funds include all funds allocated to the Title X program, *including but not limited to grant funds, grant-related income or matching funds,*" is impermissible, although for different reasons. I conclude that this part of section 59.2 cannot stand because it acts as a penalty against constitutionally protected first amendment activities. Throughout these regulations there are numerous limitations on the allowable uses of Title X project funds. These limitations are all clearly content based:[7] if it involves abortion, it is impermissible. As I will discuss further *infra,* it is permissible to put restrictions, even though content-based, on the use of government subsidies.[8] However, once the government makes the availability of funding dependent upon the restriction of activities paid for through private sources, the government requirements then become impermissible penalties on protected expression. *FCC* v. *League of Women Voters,* 468 U.S. 364, 399-401 (1984). *Cf. Regan* v. *Taxation with Representation,* 461 U.S. 540, 544-45 (1983) (upholding statute prohibiting lobbying paid for through government subsidies when lobbying paid for by private sources was expressly permitted). The government may not indirectly "produce a result which [it] could not command directly." *Speiser* v. *Randall,* 357 U.S. 513, 528 (1958).

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[7] In fact, I agree with the majority that there is a strong argument that these regulations are indeed *viewpoint* based, such that only "pro-choice," and not anti-abortion sentiments, would be deemed impermissible. This is, however, irrelevant for the purposes of this analysis.

[8] *See Regan* v. *Taxation with Representation,* 461 U.S. 540 (1933); *Student Government Ass'n* v. *Board of Trustees of the University of Massachusetts,* No. 88-1261 (1st Cir. Feb. 21, 1989).

Relying on *Speiser*, the Supreme Court in *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), reaffirmed this premise that the government

> may not deny a benefit to a person because of his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Recent abortion-related cases further emphasize this point. Court consistently have struck down regulations which attempt to curtail constitutional activities funded through private sources, by making federal grants and subsidies conditional upon the termination of these activities. *Planned Parenthood* v. *Arizona*, 789 F.2d 1348 (9th Cir.), *aff'd without opinion sub nom., Babbitt* v. *Planned Parenthood*, 479 U.S. 925 (1986); *Planned Parenthood Ass'n* v. *Kempiners*, 568 F. Supp., 1490 (N.D. Ill. 1983); *Valley Family Planning* v.*North Dakota*, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981); *cf. Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980) (stating that the case would raise a "substantial constitutional question" if all medicaid benefits were withheld from a woman because she had terminated her pregnancy and tacitly acknowledging that scenario would create an impermissible penalty on the constitutionally protected right to abort); Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 Harv. L. Rev. 1985, 1910-11 nn.71-77 and accompanying text (1988). The regulations at issue in these cases attempt to confine not just activities paid for with government funds, but *all* abortion related activities of the organization. Thus, courts have struck down these provisions as penal-

ties "designed to chill the exercise of [a] constitutional right." *Planned Parenthood*, 789 F.2d at 1350.

The impermissible definition within § 59.2 does not merely define Title X project funds as funds allocated by the government under Title X. Rather, also included in the definition are grant-related income and matching funds, both clearly recipient generated income from private sources. The government states that "[i]t is important to recognize that Section 1008 extends to all actions conducted by the federally funded project, not just the use of federal funds for abortions within the project." 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988) (codified at 42 C.F.R. § 300).

The majority opinion does not specifically address the permissibility of this section because, although recognizing the private nature of this income, later constitutional analysis within the majority opinion necessarily invalidated this section without my brothers having to reach the "penalty" question. Because I do not agree with their subsequent analysis, I think it is necessary to independently invalidate this part of § 59.2 for the foregoing reasons.

IV. *Section 59.8: Prohibition on Counseling and Referral for Abortion Services; Limitation of Program Services to Family Planning*

This section incorporates into the regulations a new definition of "family planning," as those activities relating solely to pre-pregnancy services. The major impact of this change is that abortion related activities then would be inappropriate as they are necessarily post-pregnancy.

My inquiry into this section is limited by the conclusion of the foregoing section that the definition of Title X projects must include only those expenditures of federal funds, thus exempting from these regulations any activities provided for through private or state monies. Thus, the scope

of this section is limited to the permissibility of regulating these *federally* funded activities.

The majority concludes that this section, in its entirety, is unconstitutional because it violates women's right to reproductive choice under *Roe* v. *Wade*, 410 U.S. 113 (1973), and its progeny. I believe that only the first sentence within § 59.8 (2) must be struck.

This part of section 59.8 (2) creates a two-part procedure for dealing with Title X clients who become pregnant. First, the woman *must* be referred to a pregnancy care facility. Furthermore, she can be referred only to those services that are markedly pro-life.[9] I think both of these provisions are impermissible under *Roe* and subsequent cases.

It is difficult to state definitively what rights *Roe* has established. But certain principles are clear. Notably, a woman's dialogue with her physician about childbearing decisions should be free from state interference. *See City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429-30 (1983); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

The first sentence within § 59.8 (2) must fall for the reasons enunciated by the Supreme Court, when it struck down the informed consent provisions of *Akron* and *Thornburgh*. *See, supra*, at 27-28. This part of the regulations requires doctors to refer patients elsewhere and furthermore, forces them to refer patients only to "pro-life" institutions. First, this forces the dissemination of

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[9] This part of the regulation states that the referral must be to a provider "that promote[s] the welfare of mother and *unborn child*" (emphasis added). I agree with the majority that, contrary to appellant's assertions, there is no reasonable interpretation of this section except that referral groups must be "pro-life."

"dubious" facts because in many instances other clinics, who cannot be referred to because they perform or counsel about abortions, may be better suited or equipped to help the physician's patient. *See Akron*, 462 U.S. at 444 (striking down informed consent provision in part because the information to be disseminated included "dubious state[ment[s]"). Similarly, against all notions of medical ethics and responsibility, *see, e.g.*, AMA, Current Opinions on Ethical and Medical Affairs of the American Medical Association 31-33 (1986); ACOG, Standards for Obstetric-Gynecologic Services 57 (1985), the doctor is forced to refer his or her patients to certain clinics *regardless* of what the doctor believes is most medically sound or in the patient's best interest. Truly the metaphorical straightjacket. *See Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67 n.8 (1976) (stating that to force doctors to give certain information to patients was to "confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession."). Thus, as the majority aptly notes, the Supreme Court in *Thornburgh* struck down a similar referral requirement. 476 U.S. at 762-63. Whereas the government clearly has a right to speak, and to add its voice to the "marketplace of ideas," this right does not extend to the deliberate dissemination of misinformation.

Nevertheless, the remainder of this section must be upheld. The government is stating that those programs using Title X funds can focus solely on pre-pregnancy activities. Therefore, this regulation simply defines the scope and eligibility of receiving these government subsidies.

The majority argues that these regulations are invalid because they interfere with "constitutionally protected decisionmaking." Furthermore, they contend that these regulations have the impermissible effect of denying

womens' access to information necessary to responsibly make child-bearing decisions.[10] This argument ignores, however, the standards enunciated by the Supreme Court in *Harris* v. *McRae,* 448 U.S. 297 (1980), and *Maher* v. *Roe,* 432 U.S. 464 (1977). Those cases clearly represent that the government may subsidize pro-life services, as long as the funding does not have the effect of infringing upon a woman's right to make child-bearing decisions.

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[10] Appellee's as well as others who have criticized these and similar regulations, argue that by limiting the scope of service provided, the government is in fact misinforming the clients of these programs. Brief of Appellee, NFPRHA, at 47; Brief of Appellee, Commonwealth of Massachusetts and Mary Moe, intervenor, at 52, 54; *see* Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?,* 41 Stan. L. Rev. 401, 403 (1985) (authored by Carole Chervin). There is a strong argument that if the government was, through its programs, intentionally misrepresenting or fabricating medical information, then the regulations *as applied* would be impermissible. However, this is not the case.

First, there is no evidence in the record of misrepresentations. Title X programs now are specifically defined as *pre*-pregnancy family planning services and there are numerous references throughout the regulations that these projects may not counsel about or provide other abortion-related services. Thus, patients attending these clinics are aware that information about abortion is unavailable and that they can and should go elsewhere for these services.

Moreover, any possible confusion could be easily alleviated through explicit disclaimers in program literature and/or offices that state that their services do not cover abortion-related information, *although there are other agencies that do provide these services.* Some commentators argue that even such neutral statements would violate the regulations. *See* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment,* 101 Harv. L. Rev. 1916, 1928-29 (1988). We are, however, duty bound to interpret these regulations, if possible, in a manner that is consistent with the plain language of the regulations and that upholds their constitutionality. Thus, as there is; no evidence to the contrary, I conclude that such a disclaimer would not violate these regulations.

The Court in *Maher* and *Harris* relied on the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher,* 432 U.S. at 475.

These regulations do not affirmatively block access to this information. Indigent women who could not pay for private consultation about these issues truly are in no worse a position after the implementation of these regulations. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Harris,* 448 U.S. at 316. The Supreme Court, in examining the Hyde Amendment, which exempted abortions from the Medicaid funding program, stated

> the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. . . . Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.

Harris, 448 U.S. at 317-18.

In this case, the holding of these funding cases should be dispositive. There has been no direct state interference in this case. Rather, the government has decided to fund only those programs that it wishes to support, thereby encouraging legislatively favored activities. Even the majori-

ty acknowledges that government may legitimately "seek to encourage women to make a voluntary and intelligent decision not to terminate their pregnancies. . . ." *Supra,* at 38 (quoting *Kempiners,* 531 F. Supp. at 329). Although the unavailability of this information to women is disturbing, it is not a situation created by the government and at this point, need not be rectified through government programs. The government need not pay for the exercise of all guaranteed rights. Similar to the case of *Student Government Ass'n* v. *Board of Trustees of the University of Massachusetts*, No. 88-1261 (1st Cir. Feb. 21, 1989), in which we decided that the State University should not be forced to pay for legal services in all types of cases, including suits against itself, there is no reason why the government here should be forced to subsidize a position on childbearing that it opposes, or feels is against the public interest.

A free and open marketplace of ideas does not require the government to speak about every position for equal time and in a similar light. Rather, the government must be considered just one voice within the chorus. To hold otherwise would be " 'to compel [the State] to adopt a position of neutrality; subsidizing childbirth and abortion-related counseling and referral services on an equal basis. However, as *McRae* and *Maher* clearly indicate, there is no requirement that the State be neutral vis-a-vis abortion. It is free to express its preference for childbirth. . . .' " *Planned Parenthood* v. *Arizona*, 718 F.2d 938, 944 (9th Cir. 1983) (quoting *Planned Parenthood Ass'n* v. *Kempiners*, 531 F. Supp. 320, 325 (N.D. Ill. 1981)).

Government speech, advocating for or against certain positions is not controversial in other areas, such as in anti-smoking campaigns or within the "war" against drugs. The government's "authority to advocate positions is not a threat to the democratic process (or to constitu-

tional liberties), but rather can be viewed as part of that process . . . [A]s a practical matter, disabling the government from expressing views on matters of public interest or debate would improperly deprive it of its ability to secure cooperation in implementing legitimate policies." Hirt, *supra*, at 1906-07. Although some commentators argue that the First Amendment should be a check on *any* government indoctrination, *see* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1923; M. Yudof, *When Government Speaks* 157 (1983), the more appropriate standard is that "government [can] add its own voice to the many that it must tolerate, provided it does not drown out private communication." L. Tribe, *American Constitutional Law* 807 (2d ed. 1988).

The majority finds that there has been direct state interference. This necessarily assumes, however, that these regulations apply to *all* family planning programs, rather than just the expenditures of Title X funds. If indeed these regulations applied under all circumstances to all doctors who treated pregnant women, then I would agree that clearly, under *Akron* and related cases, this would be an impermissible, government placed obstacle.[11] But they do not. Private sources remain free to disseminate any abortion related information. Moreover, Title X recipients may still conduct prohibited activities with private funds if sufficiently separated from the Title X programs. Thus,

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[11] Similarly, if there was evidence on the record that Title X programs were the *only* source of pregnancy counseling *and* if there was evidence that, lacking Title X, other state or private programs would not be able to satisfy these unfulfilled needs, I would then agree with the majority that by regulating Title X programs these regulations in fact block access to certain information and are thus impermissible. There is, however, no such evidence at this time.

the government has not, as the majority has argued, blocked all access to this information.[12]

Although indigent women may remain unable to get the information necessary to make a truly informed decision, this result is due to their indigency and not the regulations in question. The government is not obliged under *Roe* to provide complete information on all child bearing alternatives to all women who could not otherwise afford it. When proclaiming the right of a woman to make her own choice in conjunction with her physician about child bearing, I cannot agree that the Supreme Court also mandated government funding of the education about post-pregnancy alternatives.[13]

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[12] It is arguable that a similar analysis should be applied to the referral section of this regulation, as Title X recipients only, and not all doctors, must comply with the referral requirements. Nevertheless, I think there is an important, though admittedly subtle, distinction between a rule that prohibits the dissemination of certain information and a rule that affirmatively requires recipient doctors to inform patients of possibly "dubious" facts, against what they may think is in the best interests of the patient. In this case, the government crosses the line and creates a direct obstacle to information, impermissibly intruding into the doctor-patient dialogue.

Also, requirements of this type become especially troublesome when, as is the case with the referral section, they become effective only once a woman has already become pregnant. At this point, available resources and rapidity of action become vital to women who need to make their child-bearing decisions.

[13] *See Harris,* 448 U.S. at 316 (responding to the argument that a woman's freedom of choice was impaired by the government's funding decisions, stated that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

V. Section 59.10: Prohibition or activities that encourage, promote or advocate abortion

The majority argues that this section should be enjoined because it violated the first amendment. Again, their opinion flatly concludes, without explanation, that these provisions go far beyond the government decision to fund certain activities under *Harris* and *Maher* and instead are an "unlawful attempt to suppress 'dangerous ideas,' " prohibiting *all* abortion related advocacy. An entire page of their opinion is dedicated to determining whether these regulations are viewpoint or content based, even though this determination is irrelevant to the analysis.

I think that the majority's analysis would apply only if these were regulations, like those in *Akron*, which applied to *all* physicians under all circumstances. These requirements do not prohibit all abortion related advocacy; instead, they refuse to fund that advocacy. Thus, the Secretary, through these regulations, is again making a decision about the scope of the Title X program. Consistent with the pre-pregnancy counseling focus of the program, abortion related lobbying, advocacy, or litigation is disallowed as outside of the program's purposes. *See UMass, supra.*

The majority opinion also concludes that this section is impermissible based upon dicta in *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983). The majority in part relies on the burdensome requirements created by § 59.9 in order to distinguish these cases. In *Regan*, an organization needed only separate incorporation and recordkeeping from its lobbying affiliate in order to qualify for tax deductible contributions. Clearly, the separation requirements under § 59.9 created a much greater burden on affected programs. However, the correct result then, considering that I do not believe that this section is unconstitutional, should be to strike § 59.9 and let the rest remain.

The majority relies, however, on the content based (and possibly viewpoint based) nature of these regulations in order to finally conclude that the analysis and holding of *Regan* do not apply. *Regan* cannot be distinguished so easily. *Regan* does not stand for the proposition that only content-neutral subsidies would be permitted. The only standard which the Court adopted was that the government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Id.* at 548 (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). We have interpreted this requirement strictly, concluding that "suppression" could only mean a virtual "drowning out" of the voice or idea. *UMass, supra*, at n.4.

In this case, there is no evidence with which to conclude that the government, in enacting these regulations, was attempting to drown out all discourse about or in favor of abortion. And there is no evidence that there would in fact be such an effect. It is clear that these provisions are strictly limited to Title X programs and that there are private and state agencies that will continue to provide these services. Also, these regulations may not restrict the activities of these organizations that are conducted with funds not received directly through the Title X program.

Although the government was certainly attempting to *decrease* available abortion counseling, that alone cannot satisfy the standard enunciated in *Regan*. Otherwise, every non-neutral statement and every funding decision, which all must aim at the increase or decrease of some idea, would necessarily be impermissible. *See id.*

This section is analogous to and permissible under *Regan*.[14] The Court in that case stated

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[14] I acknowledge that these regulations do not fall neatly into the subsidy frameworks of either the abortion funding cases or *Regan*. In

> [Appellant] is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. But . . . the Code does not deny [appellant] the right to receive deductible contributions to support its non-lobbying activity, nor does it deny [appellant] any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right.

Regan 461 U.S. at 545 (citations omitted). The Court made clear that state subsidization is not necessary before first amendment rights can be "fully realized." *Id.* at 545-46.

McRae and *Maher*, the government subsidy (Medicaid) was available to individuals who satisfied a specified needs based test. In *Regan*, the subsidies (tax exemptions) were given to organizations that satisfied specified criteria.

In this case, it is possible to see two different parties as recipients of Title X aid. First, the family planning groups are direct recipients of the government funds. These groups can be analogized to the recipients in *Regan*. In both instances their entitlements arose due to the satisfaction of certain conditions (to be a non-profit corporation or a family planning service) but would be withheld or withdrawn if other conditions were violated (for instance, if the group conducted lobbying activities or counseled about abortions).

Also, the clients of the Title X programs are indirect subsidy recipients by the reduced cost of the services that can be provided by these programs. Although this subsidy cannot be equated with the models of subsidization discussed above, subsidies need not be direct transfers of funds nor be conditioned upon need based determinations.

Conclusion

Regardless of the intent of the Secretary in enacting these regulations, it is important to realize that their effect is not as sweeping or destructive as the majority fears. The regulations may only constitutionally restrict the activities conducted with federal funds. Clearly, state and private agencies may continue to provide any abortion-related services. More importantly, however, my opinion would not change the fact that even groups that receive Title X funds could continue to provide *any* services, even advocating for or providing abortions, as long as minimal financial separation of funds is maintained.

The government has chosen through these regulations to subsidize *pre*-pregnancy family planning services, nothing more. I do not see a constitutional requirement that they must either subsidize no programs or every one that exists. The regulations restrict the scope of the government's expenditures, without having any effect on the other activities within the affected organizations. This should not be objectionable.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0253-S

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, HEALTH AND HUMAN SERVICES, DEFENDANT

MEMORANDUM AND ORDER FOR FINAL DECREE

March 3, 1988

SKINNER, D.J.

Plaintiffs in this action seek to enjoin the application and enforcement of regulations promulgated by the defendant purporting to carry out the purposes of Section 1008 of Title X of the Public Health Services Act. 42 U.S.C. § 300a-6 (1982). The defendant moved to consolidate the hearing on plaintiffs' motion for a preliminary injunction with the hearing on the merits pursuant to Fed.R.Civ.P. 65(a)(2). At oral argument I denied the motion on the representation of the plaintiffs that there were unresolved question of fact raised by their several affidavits. Upon examination of these affidavits, however, I

conclude that the issues of fact they raise relate to predicted adverse consequences of the regulations, such as their potential for conflict with the medical ethics of some physicians, and to the likelihood of immediate irreparable harm. Plaintiffs argue that Congress could not have intended the predicted consequences and that the regulations therefore violate congressional intent. If unintended consequences were enough to invalidate government action, I doubt that much would survive. Such policy considerations are in any case for Congress, not the courts. Furthermore, immediate irreparable injury is not an issue unless preliminary relief is to be granted. Since the controlling legal issues have been fully briefed and argued, there is no reason to delay a final decision. My order denying the motion to consolidate is VACATED and the motion to consolidate is ALLOWED. A final decree will issue.

A. The Controversy

On February 2, 1988, the Department of Health and Human Services ("HHS") amended the regulations governing the use of federal funds for family planning services. Its purported goal was to assure compliance with section 1008 of Title X:

> None of the funds appropriate under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. § 300a-6 (1982). Historically, this section had been interpreted by HHS (and the Department of Health, Education and Welfare, its predecessor) to prohibit the use of federal funds in the provision of abortions, or in any activity that had the immediate effect of "promoting or encouraging" abortion. The new regulations, which are scheduled to go into effect in two parts, on March 3 and April 4, 1988, significantly expand the scope of prohibited activity.

The new regulations define family planning to exclude all pregnancy care (including obstetric and prenatal care). They provide that a project may not receive federal funds unless it assures compliance with the following rules:

(1) A project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning. 42 C.F.R. § 59.8(a)(1) (1988).

(2) Once a client is diagnosed as pregnant, she must be provided with a list of providers that promote the welfare of the mother and unborn child.[1] She must also be provided with information to protect the health of the mother and unborn child until the referral appointment is kept. 42 C.F.R. § 59.8(a)(2) (1988).

(3) A project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning. 42 C.F.R. § 59.8(a)(3) (1988).

(4) The provision of contraceptive information may not include counseling with respect to abortion as a method of family planning, although it may include information which is medically necessary to assess the risks and benefits of different methods of contraception. 42 C.F.R. § 59.8(a)(4) (1988).

(5) A project may not use Title X funds to promote or advocate abortion as a method of family planning. 42 C.F.R. § 59.10(a) (1988). Prohibited activities include:

a. Lobbying for legislation to increase the availability of abortion as a method of family planning;

b. Providing speakers to promote the use of abortion as a method of family planning;

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[1] At oral argument plaintiffs' counsel pointed out that this language excludes providers that offer abortion counseling or services. Defendant did not contest this interpretation, and I will accept it as conceded.

c. Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

d. Using legal action to make abortion more readily available as a method of family planning;

e. Developing or disseminating any information which advocates abortion as a method of family planning.

(6) A Title X project must be organized so that it is physically and financially separate from all prohibited activities. The Secretary of HHS will determine whether such objective integrity and independence exist based on an individual review of a number of factors and circumstances. 42 C.F.R. § 59.9 (1988).

The regulations also define "Title X project funds," for the first time, to include "all funds allocated to the Title X program, including, but not limited to grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2 (1988). A Title X project has always been required to supplement its federal grant with 10% matching funds. In practice most Title X agencies also charge fees for services to those clients who have the ability to pay, in general generating another 10% of their budget. Therefore, when the regulations limit the use of "Title X project funds," they in fact significantly restrict a project's use of both federal, and non-federal, money.

Plaintiff allege that the new regulations conflict with Title X and violate the First and Fifth Amendments of the United States Constitution. The only existing precedent consists of an as yet unpublished opinion of Judge Zita Weinshienk on a motion for preliminary injunction in *Planned Parenthood Federation of America, et al. v. Bowen*, CA 88-2-158 (D. Colo. February 24, 1988). Judge Weinshienk has ruled that the regulations violate the intent of Congress and the constitutional rights of the plaintiffs and has entered a preliminary injunction prohibiting

the defendant from enforcing the new regulations or conditioning Title X grants upon compliance with them.

B. Conflict with the Statute

1. *General Considerations*

The defendant has broad authority to promulgate regulations under Title X. 42 U.S.C. § 300-4(a) (1982). The regulations must be consistent with and must further the purposes of the statute. The particular section of the statute involved in this case is ambiguous. It is not clear whether the prohibition in section 1008 of the use of appropriated funds "in programs where abortion is a method of family planning" is limited to programs which offer or promote abortions, as plaintiffs say, or whether it provides "a wall of separation" between Title X programs and all abortion related activity, as the defendant says. "[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

In pursuit of their favored constructions of the statute, the parties have tried to run to ground that hardy chimera, congressional intent. In my view, congressional intent must be considered with respect to specific issues raised by the new regulations.

a. Counseling and Referral
42 C.F.R. §§ 59.8(a)

In support of their respective positions about the validity of the counseling and referral restrictions, the parties cite various pronouncements by individual members of Congress. Plaintiffs cite a 1988 commitee report accompanying a Continuing Resolution which encouraged continuation of the prior regulations without change. A group

of senators and congressman filed an *amici* brief which indicates their own support and refers to the support of many other congressmen for the regulations a promulgated. These expressions of various individuals are of little assistance in evaluating the intent of Congress as a collective body. *Consumer Products Safety Commission v. G.T.E. Sylvania*, 447 U.S. 102, 118 (1980); *Chrysler Corporation v. Brown*, 441 U.S. 281, 311 (1979). Rep. Dingall's statement in 116 Cong. Rec. 37,375 (1970) is countered by his subsequent letter to the defendant dated October 14, 1987.

Plaintiffs rely on congressional acquiescence to prior longstanding administrative interpretation of the statute by the defendant and his predecessors. In a series of memoranda and opinions from 1970 to the promulgation of these regulations, the Department of Health and Human Services (and the Department of Health, Education and Welfare) consistently interpreted the statute to forbid Title X recipients from conducting activities which had the direct effect of promoting or encouraging abortion, but to allow the clinics to furnish information concerning abortion services. In 1981, departmental guidelines were issued which mandated non-directive counseling on options for pregnant women, including abortion, when a client requested information. Referral for the purpose of abortion was permitted. Memorandum from Joel N. Mangel, Office of General Counsel, HEW, to Louis M. Hellman, Deputy Assistant Secretary for Population Affairs (April 20, 1971); Memorandum of Carol C. Conrad, Office of General Counsel, HEW, to Elsie Sullivan, Office for Family Planning (April 11, 1978); Bureau of Community Health Services, Department of Health and Human Services, Program Guidelines for Project Grants for Family Planning Services (1981).

There is no doubt that Congress was aware of this administrative history and yet resisted attempts to change the statute. If the validity of the departmental interpretation from 1970 to the present were in question, this history would be compelling. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *United States v. Correll*, 389 U.S. 299, 305-6 (1968). The new regulations represent an abrupt reversal of existing policy which is not positively mandated by section 1008. The plaintiffs argue that since Congress acquiesced in the former policy, the proposed regulations violate Congress' intent and must be struck down. Judge Weinshienk takes essentially the same view. This assumes that Congress operates on a binary system like a computer; i.e., that it has only two choices. Congress gave to the defendant very broad authority to promulgate regulations, and it is an equally valid supposition in my opinion that Congress would tolerate a wide range of administrative policies. *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941); *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986).

While a good case can be made for the plaintiff's proposition that these regulations violate congressional intent, the question is not sufficiently free of doubt in my mind to justify judicial intervention. Accordingly, no injunction will issue to the cited sections of the regulations on the ground of contravention of the intent of the statute, apart from constitutional considerations to be discussed *infra*.

There is a related doctrine, however, that when an agency decides to change the course of longstanding administrative interpretation, it must justify its action to a greater degree than when it first promulgates regulations:

> A "settled course of behavior embodies that agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

> There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required in the first instance.

Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 41-42 (1983).

The defendant puts forth two reasons for the changes in his agency's policy. First, he argues that the new interpretation is mandated by the statute. This clearly is not the case. Second, the defendant argues that the regulations are needed to assure compliance with the mandate of section 1008 that the provision of abortion services be kept separate from Title X funds. The defendant must show that this explanation is supported by the evidence before the agency. *Motor Vehicle Manufacturers Association v. State Farmy Mutual*, 463 U.S. at 43.

All the evidence before the defendant indicated that Title X clinics were substantially complying with program requirements. *Family Planning Act Reauthorization, 1985: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 189 (1985) (statement of Dr. James O. Mason, Acting Assistant Secretary for Health, HHS) ("the prohibition against abortion was well-known at the level of the family planning clinics, and it was being honored"); *Family Planning Act Reauthorization, 1985: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 472 (1984) (statement of Margaret M. Heckler, Secretary, HHS) (same); Comp.

Gen. Rep. No. GAO/HRD-82-106 (1982) ("GAO found no evidence that title X funds had been used for abortions or to advise clients to have abortions"); Memorandum from Richard P. Kusserow, Inspector General, to Edward N. Brandt, Jr., Assistant Secretary for Health (November 18, 1982) ("Grantees were generally aware of the legal prohibitions against using Title X grant funds for lobbying, contributions to third parties, and/or abortion related activities").

The agency can only point to the General Accounting Office's suggestion in its 1982 report that HHS issue regulations to clarify the standards under section 1008. Comp. Gen. Rep. No. GAO/HRD-82-106 at iv. This can best be interpreted, however, as a suggestion that HHS codify its longstanding policy into regulations, so as to reduce any confusion about program requirements. There was no suggestion that significantly more stringent regulations need be issued in order to assure compliance.

The agency also refers, in its commentary to the new regulations, to a number of letters received by the agency from individual clients of Title X clinics who claimed that they were pressured into undergoing abortions which they did not want, and subsequently came to regret. 53 Fed. Reg. 2924-25 (February 2, 1988). In light of the anecdotal nature of these letters, and their inconsistency with the GAO report and Secretary Heckler's testimony, they are not reliable evidence upon which to base such a significant policy reversal.

In *Motor Vehicle Manufacturers Association, supra*, the Court refused to enforce regulations which reversed prior administrative policy and remanded the matter to the agency to amend the regulations to conform to the record. I suppose an option in this case would be to stay the effective date of the HHS regulations to give the executive branch an opportunity to amplify the record justifying its

policy change. In view of the constitutional considerations discussed *infra*, however, such a procedure would be pointless.

b. Lobbying and Advocacy

42 C.F.R. § 59.10(a)

The restrictions on lobbying and advocacy are for the most part a codification of prior administrative interpretation. A 1978 memorandum from the HEW Office of Legal Counsel indicated that Title X funds could not be used for advocacy activity designed to promote abortion as a method of family planning. Memorandum from Carol C. Conrad to Elsie Sullivan (April 11, 1978). Congressional acquiescence in these restrictions, despite repeated opportunity to amend the statute, can fairly be construed as an indication that the restrictions are consistent with congressional intent. *Lorillard v. Pons,* 434 U.S. at 580; *United States v. Correll,* 389 U.S. at 305-06.

The new regulations, of course, have a wider impact because of the new (and unwarranted) definition of "Title X Project Funds." The new regulations prohibit the use of non-federal funds for lobbying as well as federal funds, and also prohibit membership in or support of any organization which engages in lobbying. While this extension is not so radical a change as to warrant a conclusion that the new regulations violate the intent of Congress, the constitutional implications are serious, as discussed *infra.*

c. Physical and Financial Separation

42 C.F.R. § 59.9

The program integrity regulations promulgated by HHS require that a Title X grantee be physically separated from any program that performs activities prohibited under the

statute. 42 C.F.R. § 59.9 (1988). There is no indication in section 1008 that Congress intended to restrict the types of projects with which a Title X recipient could associate, or to place limitations on the physical proximity or the sharing of personnel between Title X projects and unrelated programs which may provide abortion services. The statute merely restricts some uses of appropriated funds.

The legislative history of Title X offers persuasive evidence that the program integrity regulations run contrary to congressional intent underlying section 1008. The original Conference Report on Title X stated that the abortion prohibition was "not intended to interfere with or limit programs" supported with other than Title X funds. H.R. Conf. Rep. No. 1667, 81st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5082. Furthermore, the Report of the Senate Labor and Public Welfare Committee for the 1975 reauthorization of Title X provided:

> The Committee encourages the use of funds otherwise authorized by this bill for the provision of family planning services, not only in specialty clinics, but, where such facilities do not exist or are impractical, in entities devoted to comprehensive health care for low-income families. . . . [I]t is essential that there be close coordination and, whenever possible, integration of family planning services into all general health care programs.

S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 528.

The contemporaneous and continuous agency interpretation was consistent with this view.[2] Indeed, the statute

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[2] The agency position, until these regulations were promulgated, was that as long as funds were kept separate, physical separation was unnecessary. In 1971, the Office of General Counsel of the Depart-

itself mandates a state plan for a "*coordinated and comprehensive* program of family planning services" as a prerequisite to any Title X grant. 42 U.S.C. § 300a(a) (1982) (emphasis added). The requirement of physical separation runs contrary to this congressional emphasis on coordinated and integrated health care services.

Defendant argues that the validity of the program integrity regulations is not presently ripe for review. The regulations require that the Secretary make an individual determination of program integrity for each grant recipient. They require physical and financial separation, and articulate a number of factors upon which the Secretary may rely in making his decision. Defendant argues that until the regulations are construed and applied, the question of their validity should not be decided.

The Supreme Court has articulated a ripeness test that direct courts to evaluate two criteria: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The appropriateness of an issue for judicial review depends upon a number of factors, including whether the agency action is final, whether the issue presented requires additional factual development, and whether further administrative action is needed to clarify the agency's position. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986).

Defendant argues that this part of the regulations will be applied on a case-by-case basis, and, therefore, that it is

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ment of Health, Education and Welfare indicated in an opinion letter that under most circumstances, a hospital providing abortions for family planning purposes would be qualifying to receive Title X funds for the operation of a separate family planning clinic, as long as funds were kept separate. Memorandum from Joel M. Mangel to Louis M. Hellman at 3 (April 20, 1982).

premature to adjudicate its validity. I see no need to litigate each instance separately. These are the defendant's regulations and it is reasonable to assume that he will do what he says he will do, which is to require physical separation. This clearly runs counter to congressional policy favoring coordination and integration of health care programs. It will be enjoined.

d. Definition of "Title X Project Funds"

42 C.F.R. § 59.2

The proposed regulations define "Title X project funds" to include "all funds allocated to the Title X program, including, but not limited to grant funds, grant-related income or matching funds." The effect is to put the use of matching funds and the income from fee paying clients under the same restrictions as funds appropriated by Congress. There is no basis for this definition in the statute and no legislative or administrative history to support it. I assume that this beginning exercise in political redefinition ("think-speak" in Orwellian terms) was designed to preempt the constitutional argument to be discussed hereinafter. In my opinion, it is unwarranted. The legislative concern was with the use of *public money.*

C. Constitutional Considerations

Plaintiffs challenge the new regulations on First and Fifth Amendment grounds. Because the limitations on counseling and referral and the limitations on lobbying and advocacy require different constitutional analyses, I will address each separately.

1. *Counseling and Referral*

Under the new regulations, a Title X project may not provide abortion counseling or referral. 42 C.F.R.

§ 59.8(a)(1)-(3) (1988). It may not counsel with respect to abortion as a method of family planning when it provides contraceptive information. 42 C.F.R. § 59.8(a)(4) (1988). Any project which conducts any of these activities is ineligible for a Title X grant. 42 C.F.R. § 59.7 (1988). If an organization conducts these activities in a separate program, the Title X project must be physically and financially separate from the prohibited activites. 42 C.F.R. § 59.9 (1988).

The restriction on abortion counseling and referral extends to an entire Title X "project," and to all Title X "project funds," as redefined by the regulations. As a result, even a project which uses non-federal funds, either matching funds or private funds, to provide abortion counseling or referral, is made ineligible to receive a Title X grant.

Plaintiffs argue that these restrictions violate the First Amendment to the United State Constitution. Abortion referral and abortion counseling are constitutionally protected speech under the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Denying an otherwise eligible organization a grant because it provides abortion counseling or referral, even with non-federal funds, constitutes an impermissible penalty for the exercise of a constitutionally protected right. The government may not penalize an individual for exercising his or her First Amendment rights, even if the penalty is the denial of a government benefit:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for a number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1971).

The government argues that it may constitutionally choose not to subsidize certain activities. In *Maher v. Roe*, 432 U.S. 464 (1977), and in *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court was presented with challenges to Medicaid systems that did not subsidize abortion. The Court held that the state may make a value judgment favoring childbirth over abortion, and may implement that value judgment by the allocation of public funds. In essence, the Court said the government had no obligation to subsidize abortion, or to subsidize abortion and childbirth equally. In both cases, however, the Court acknowledged the difference between a refusal to subsidize and a penalty. The Court noted that refusing all Medicaid benefits to a woman because she had an abortion, although the practice might "promote childbirth," would be an impermissible penalty for the exercise of a constitutionally protected right. *Harris v. McRae*, 448 U.S. at 317, n.19; *Maher v. Roe*, 432 U.S. at 474-475, n.8.

The defendant argues that the HHS regulations are permissible under *Maher* and *Harris* because they merely reflect the government's legitimate decision not to subsidize certain activities. The defendant ignores, however, the crucial difference between a failure to subsidize and a penalty for the exercise of constitutional rights. The HHS regulations go beyond a mere refusal to subsidize. Under the new regulations, a Title X project could be denied a grant for which it would otherwise be eligible, solely because its non-federally funded activities include abortion referral and counseling. As a result, the regulations constitute an unconstitutional penalty for the exercise of First Amendment rights. *See Reproductive Health Services v. Webster*, 662 F. Supp. 407, 427-28 (W.D. Mo. 1987) (invalidating as unconstitutional provisions which prohibit the expenditure of public funds, actions of public employees, or use of public facilities, for the purpose of,

inter alia, counseling a woman to have an abortion); *Planned Parenthood v. State of Arizona*, 537 F. Supp. 90 (D. Ariz. 1982) (invalidating as unconstitutional a bill which prohibited state money from being given to agencies which offer abortion counseling or referral), *rev'd and remanded*, 718 F.2d 938 (9th Cir. 1983), *aff'd after remand*, 789 F.2d 1348 (9th Cir. 1986), *aff'd sub nom. Babbitt v. Planned Parenthood*, ____ U.S. ____, 107 S. Ct. 391 (1986).

Furthermore, the restriction on speech imposed by the defendant's regulations is content-based. These regulations, individually and as a whole, have the purpose and effect of severely limiting speech by Title X recipients on one topic: abortion as a method of family planning. Such a content-based distinction violates the First Amendment: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*. 408 U.S. 92, 95 (1972).

The new regulations cannot withstand the "critical scrutiny" demanded by accepted First Amendment and equal protection principles. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786-87 (1978). The government has not suggested a compelling governmental interest that would justify the content-based distinction. If a regulation is narrowly tailored to achieve a compelling governmental interest, incidental restrictions on speech will on occasion be tolerated. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In this case, however, the regulations are specifically designed to suppress speech, and particularly directed at the suppression of one viewpoint. As a result, they run directly contrary to the dictates of the First Amendment.

In its attempt to implement a health care policy which promotes childbirth, the defendant has devised a system which rests in large part on keeping Title X clients in ignorance. The First Amendment embodies a different philosophy:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

2. ***Lobbying and Advocacy***

The prohibitions in 42 C.F.R. § 59.10 on activities that encourage, promote, or advocate abortion clearly implicate the First Amendment. Even the Secretary concedes, in his brief on this motion, that lobbying and other advocacy activities are at the "core" of the First Amendment. While the constitutional underpinning for the right to *have* an abortion is relatively abstruse, see *Roe v. Wade*, 410 U.S. 113 (1973), and remains the subject of learned discourse, the right to *talk* about abortion is firmly and expressly guaranteed. Prior to *Roe v. Wade*, some states permitted abortions and some did not. The discussions that led to these legislative policies were clearly protected by the First Amendment, and such discussions remain so today.

The new regulations reflect more than a mere refusal to subsidize protected First Amendment activity. The regulations refuse funding to any organization that engages in abortion-related advocacy, even if non-federal funds, such

as matching grants or private funds, are used. In addition, an organization that supports lobbying or other advocacy activity with funds wholly separate from its Title X grants must physically separate this activity from its Title X project.

The government argues that the regulations are constitutional under the holding of the Supreme Court in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). In that case, the Court upheld a statute which denied the right to obtain tax deductible contributions to organizations that engage in substantial lobbying. The Court held that Congress has a right to refuse to pay for lobbying out of public money. It pointed out that an organization which engaged in lobbying was not penalized, because it could locate all of its non-lobbying activity in a separate corporate structure. The separate, non-lobbying corporation could then receive tax deductible contributions. The Court also held that the lobbying restriction did not violate the equal protection component of the Fifth Amendment, even though veterans' associations were allowed by statute to engage in substantial lobbying activity while receiving tax deductible contributions.

Applying the same reasoning to this case, the government says that it may constitutionally choose not to subsidize lobbying. It argues that because family planning projects can place their lobbying activities in a separate organizational structure, the regulations restricting lobbying are constitutional. This argument is unpersuasive for two reasons. First, the regulations impose an additional requirement of physical separation which, however it would ultimately be implemented by the Secretary, is unduly burdensome and not narrowly tailored to meet the government's goal of not subsidizing advocacy activity. *See Regan v. Taxation with Representation*, 461 U.S. at

554 (Blackmun, J., concurring) (emphasizing that the I.R.S. required only separate incorporation and separate record-keeping, and questioning whether more burdensome requirements would be constitutional).

More importantly, this case is distinguishable because the lobbying restriction in the HHS regulations is content-based. The Supreme Court in *Taxation with Representation* specifically said: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' ai[m] at the suppression of dangerous ideas.' " *Regan v. Taxation with Representation*, 461 U.S. at 549. It upheld the classification only because it found "no indication that the statute was intended to suppress any ideas or any demonstration that it has that effect." *Id.*

The advocacy restrictions in the HHS regulations are clearly designed to suppress a certain idea: they restrict only advocacy that promotes abortion as a method of family planning. As discussed previously, such a content-based distinction violates the First Amendment. Because the restrictions are not narrowly tailored to serve any legitimate governmental interest, they violate both the First Amendment and the equal protection component of the Fifth Amendment to the United States Constitution.

3. Impact on the Right of Privacy

While the relationship of these regulations to the liberty interest protected by the Fifth and Ninth Amendments is more attenuated than to the First Amendment, it is still significant. The right to elect an abortion in the first trimester is constitutionally protected from unduly burdensome governmental interference. *Roe v. Wade*, 410 U.S. at 163; *Maher v. Roe*, 432 U.S. at 473-74 (1977). In my opinion, a governmentally imposed block on the flow of neutral information bearing on abortion is an imper-

missible burden on the presently recognized rights of a pregnant client of a Title X clinic. An example of such an improper burden is the prohibition against non-directive referrals to health providers who offer abortion counseling or services.

D. Conclusion

If these regulations were to be considered solely on the basis of congruence with legislative intent, or solely on the basis of constitutional violation, some attempt at severance might be in order. As the foregoing discussion establishes, however, there is very little in these regulations which does not offend one standard or the other. Severance would save practically nothing. The attempt would be inappropriate. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) ("The radical dissection necessary for this would leave little resemblance to that intended . . ."). The regulations promulgated on February 2, 1988 by the Department of Health and Human Services pursuant to Title X of the Public Health Service Act as a whole violate both congressional intent and rights protected by the Constitution. A final decree shall enter enjoining their enforcement.

I have the authority to enjoin the defendant from implementing the regulations against any of the plaintiffs in this action. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1978) (scope of injunctive relief includes that which is necessary to afford relief to all complaining parties). This court has national jurisdiction in federal question cases. *Omni Capital International v. Rudolph Wolff & Co., Ltd.*, 56 U.S.L.W. 4031 (December 8, 1987). Two plaintiffs in this action, the National Family Planning and Reproductive Health Association ("NFPRHA") and the American Public Health Association ("APHA"), are na-

tional organizations suing in their representative capacities. NFPRH represents nearly 75% of Title X recipients and 285 subgrantees across the country. The Massachusetts Attorney General appears for all Title X recipients in Massachusetts. Because the standing of these plaintiffs to sue in their representative capacity has not been challenged, they may properly assert the rights of their constituents. *See Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977) (setting forth standards for determining an association's standing to sue in its representative capacity); *Planned Parenthood Federation v. Schweiker*, 559 F. Supp. 658, 664 (D.D.C.) (concluding NFPRHA has standing to sue as a representative of a class of member affiliate family planning clinics), *aff'd*, 712 F.2d 650 (D.C. Cir. 1983).

The Secretary is therefore enjoined from implementing the regulations promulgated on February 2, 1988 pursuant to Title X of the Public Health Service Act, as against any of the plaintiffs in this action or any of the entities they represent, whereever situated.[3] I assume that the Secretary, as a responsible public official, will apply this judicial determination evenhandedly to all similarly situated entities in the United States. *See Feld v. Berger*, 424 F. Supp. 1356, 1363 (S.D. N.Y. 1976). *Accord Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387, 399 (2d Cir. 1973); *Stanton v. Board of Education*, 591 F. Supp. 190, 195 (N.D. N.Y. 1984).

A final decree shall issue forthwith.

/s/ Walter Jay Skinner
United States District Judge

[3] If the plaintiffs wish to amplify this order by submitting a list of the agencies they represent, I will amend the final decree by appending that list.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0253-S

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, HEALTH AND HUMAN SERVICES, DEFENDANT

FINAL DECREE

March 3, 1988

SKINNER, D.J.

This cause came on to be heard on the plaintiffs' motion for a preliminary injunction, and a motion for consolidation of said hearing with the hearing on the merits under Fed.R.Civ.P. 65(a)(2) having been allowed, and after consideration of the briefs and arguments of the parties, intervenor and *amici*, in accordance with the Memorandum and Order filed herewith, it is ORDERED, ADJUDGED AND DECREED that:

1. The defendant in his capacity as Secretary of the Departmentof Health and Human Services are all officers, agents, employees and attorneys of said Department are enjoined from enforcing or applying

the regulations published at 52 Fed. Reg. 2944-2946 (February 2, 1988), including without limitation those regulations appearing at 42 C.F.R. §§ 59.7, 59.8, 59.9 and 59.10, and the related definitions appearing at § 59.2, against these plaintiffs and the entities they represent, in any manner either directly or indirectly, anywhere within the United States.

2. The defendant shall forthwith notify all affected officers, agents, servants, employees an attorneys of the Department of Health and Human Services of the substance of this decree.

/s/ Walter Jay Skinner
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 88-1279

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PLAINTIFFS, APPELLEES

v.

SECRETARY, HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

JUDGMENT

Entered: March 19, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel before the Court sitting *en banc*.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The enforcement of the regulations is enjoined and the judgment of the district court is affirmed.

Costs awarded to appellees.

By the Court:

Francis P. Scigliano
Clerk

APPENDIX F

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

Congress shall make no law * * * abridging the freedom of speech * * *.

2. United States Constitution, Amendment V:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

3. Title X of the Public Health Service Act, 42 U.S.C. § 300(a):

The Secretary is authorized to make grants to and enter into contracts * * * to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services * * *.

4. Title X of the Public Health Service Act, 42 U.S.C. § 300a-6:

None of the funds appropriated under this subchapter shall be used in program where abortion is a method of family planning.

5. Amendments of Regulations Governing Grants for Family Planning Services

53 Fed. Reg. 2944-46 (1988)

(codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10)

For the reasons set out in the preamble, Subpart A of Part 59, 42 Code of Federal Regulations, is hereby amended as set forth below.

PART 59—[AMENDED]

1. The authority citation for Subpart A of 42 CFR Part 59 is revised to read as follows:

Authority: 42 U.S.C. 300a-4

2. In 42 CFR 59.2, the following definitions are added:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services include preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

* * * * *

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

* * * * *

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act . . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.5 [Amended]

3. In 42 CFR 59.5(a), paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(11) are redesignated as paragraphs (a)(5) through (a)(10) respectively.

4. 42 CFR 59.5(b)(3)(i) is revised to read as follows:

§ 59.5 [Amended]

* * * * *

(b) * * *

(3) * * *

(i) achieve community understanding of the objectives of the Title X program.

* * * * *

5. In 42 CFR Part 59, § 59.7 through § 59.13 are redesignated as § 59.11 through § 59.17, respectively, and new § 59.7 through § 59.10 are added to read as follows:

§ 59.7 Standards of compliance with prohibition on abortion

A project may not receive funds under this subpart unless it provide assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals

in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and pro-

vides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and theretofore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act, and

§ 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities.

The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

6. In addition to the amendments set forth above, in 42 CFR Part 59 remove the words "project" or "projects or "project's" and add in their place, the words "Title X project" or "Title X projects" or "Title X project's," respectively, in the following places:

(a) Section 59.2 definition of "low income family";

(b) Section 59.5(a)(1);

(c) Section 59.5(b), introductory text;

(d) Section 59.5(b)(3)(iii);

(e) Section 59.5(b)(4);

(f) Section 59.5(b)(7);

(g) Section 59.5(b)(10);

(h) Section 59.6(a);

(i) Newly redesignated § 59.11(a);

(k) Newly redesignated § 59.11(a)(7);

(l) Newly redesignated § 59.11(b);

(m) Newly redesignated § 59.11(c);

(n) Newly redesignated § 59.12(a), the first time it appears;

(o) Newly redesignated § 59.15;

(p) Newly redesignated § 59.16(a).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

(2)

No. 89-1929

LOUIS W. SULLIVAN, SECRETARY OF
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' MOTION TO CONSOLIDATE
WITH RUST V. SULLIVAN, NOS. 89-1391/1392

On June 11, 1990, the Solicitor General filed a petition for a writ of certiorari in this case, and suggested that the Court hold the petition pending the Court's decision in Rust v. Sullivan, Nos. 89-1391/1392, in which the Court granted certiorari less than two weeks ago, on May 29, 1990. Respondents believe that the writ of certiorari in this case should be granted immediately, and that this case should be consolidated with Rust v. Sullivan. The reasons for granting respondents' motion to consolidate are as follows:

1. Like Rust v. Sullivan, this case challenges the statutory and constitutional validity of regulations promulgated by the Secretary of Health and Human Services pursuant to Title X of the Public Health Service Act, 42 U.S.C. § 300 et seq. Those regulations prohibit clinics receiving Title X funds from counseling and referring, with respect to abortion, require physical and financial separation of Title X projects from activities prohibited by Title X, and forbid Title X clinics from engaging in advocacy for abortion. In Rust, the district court and the Second Circuit denied relief and dismissed plaintiff's complaint; in this case, the district court issued a nationwide injunction against the regulations, and the First Circuit affirmed en banc. Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990).[1]

2. While this case challenges the same regulations challenged in Rust v. Sullivan, it poses several issues that the Second Circuit did not reach, and therefore consolidation will give the Court the benefit of a full presentation in one case of all issues raised by the regulations.

3. The first issue addressed by the First Circuit but not reached in the Second Circuit concerns the

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[1] The injunction was issued not only with respect to all direct plaintiffs but on behalf of all of the members of NFPRHA. See discussion of NFPRHA in ¶ 6 infra.

effect of the challenged regulations on private fee-paying patients. The Second Circuit in New York v. Sullivan, 889 F.2d 401, 413-414 (2d Cir. 1989), acknowledged that this issue might alter the result, specifically qualifying its decision by stating:

> the present action does not pose the issues that might arise if a doctor were to treat private patients in an entity that receives Title X funds.... Whether this issue arises in the context of Title X clinics is not clear on the present record, and we do not reach it.

The en banc First Circuit, by contrast, found that issue squarely presented by the record in this case, and based its ruling that the regulations are unconstitutional upon it. The First Circuit found that the regulations controlled the treatment of private patients in a Title X clinic. Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 72.[2] And it reasoned that:

> because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

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[2] The record supports the en banc court's determination that the issue was properly presented. An affidavit submitted by Karen Cody Carlson, Executive Director of Planned Parenthood of Greater Kansas City, a Title X recipient, states that "approximately 65% of the 15,000 clients seen last year received at least some subsidization under Title X." Affidavit of Karen Cody Carlson at ¶ 5. Thus, 35% of their clients were private paying patients. See also note 3 infra.

Id. at 70. Thus, if the Court consolidates the cases, the critical issue of the effect of the challenged restrictions on private paying patients will be properly presented in a posture in which it has been ruled upon by the Court of Appeals.

4. The second issue addressed by the First Circuit but not by the Second Circuit concerns the effect of the challenged restrictions on a Title X clinic's privately-generated funds. As the First Circuit pointed out, the Second Circuit in New York v. Sullivan:

> ignored the fact that private money ('matching funds') is tied up and held hostage to the same restrictions as Title X funds because of the new definition of the 'Title X program' in the regulations. Its opinion treats the regulations as if they only applied to federal money without also placing significant conditions on matching funds.

Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 71.

The First Circuit squarely addressed the issue of the regulations' restrictions on non-federal funds, id. at 71-72, and found it particularly critical to its First Amendment analysis, as did this Court in FCC v. League of Women Voters, 468 U.S. 364 (1984). Id. at 73-74.[3]

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[3] See Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d at 73 n.11 (relying on the Secretary's admission that the "federal government provides only about

(footnote continued on following page)

Accordingly, consolidation will permit the Court to consider the issue of the regulations' impact on non-federal funds with the benefit of the First Circuit record.

5. As the Solicitor General's petition demonstrates, this case also presents a third issue which the First Circuit addressed but the Second Circuit "did not

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50% of the money supporting federally funded family planning projects," and noting "affidavits in the case show that some family planning organizations receive as little as 9% of their total operating budget from Title X"). The record basis for the First Circuit's treatment of this issue includes the following:

(1) The district court found that the regulations "significantly restrict a [Title X] project's use of both federal, and non-federal, money." Commonwealth of Massachusetts v. Bowen, 679 F.Supp. 137, 140 (D. Mass. 1988); id. at 144 (regulations "put the use of matching funds and the income from fee paying clients under the same restrictions as funds appropriated by Congress"). The Secretary conceded in his appeal briefs to the First Circuit that the regulations restrict not merely federal funds but also "matching funds and grant-related funds." Brief for the Appellant at 19 n.13; Supplemental Brief for the Appellant at 18 n.11 (admitting that regulations restrict "fees generated by a Title X project" as well as federal funds).

(2) Affidavits submitted by various clinic directors established that the plaintiff clinics in fact receive both federal funding and non-federal fees, and therefore would be subject to the admitted restriction on private funds. Affidavit of Leslie Laurie at ¶ 4 (Family Planning Council of Western Massachusetts receives 40% of its budget from Title X funding); Affidavit of Diane M. Booth at ¶ 4 (Planned Parenthood of Central Missouri receives 17% of its budget from Title X funding); Affidavit of Karen Cody Carlson at ¶¶ 4, 5 (Planned Parenthood of Greater Kansas City receives 9% of its budget from Title X funding, and services both subsidized and paying clients). Cf. Affidavit of George W. Morley at ¶ 20 ("the regulations will impose heavy financial burdens on Title X health care providers").

reach": severability. Pet. at 9. While the Solicitor General suggests that the Court might decide that issue in the first instance in Rust, it would certainly be better informed if it were reviewing a case in which the issue arose and was decided by the Court of Appeals. In addition, the Secretary's silence on this issue in the First Circuit, see 899 F.2d at 76, may prove relevant to a severability inquiry, since if the Secretary felt that the regulations were severable, he had every opportunity to say so in the First Circuit en banc briefing and argument. Thus, the First Circuit record will be instructive should this issue arise.

6. Finally, this case is also different in terms of the parties involved and the scope of relief obtained. The plaintiffs in the First Circuit case include the National Family Planning and Reproductive Health Association, a non-profit membership corporation which sued on behalf of certain of its members which in fiscal year 1989 included 65 of the 85 Title X grantees that received and administered approximately 82% of Title X grant funds.[4] Accordingly, the injunction granted by the district court

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[4] In bringing the action, NFPRHA explicitly excluded from its representation those members that were being represented in other related actions. If those excluded members are counted, in fiscal year 1989, NFPRHA members received 75 of the 85 Title X grants and approximately 94% of Title X funding.

and affirmed by the en banc First Circuit, by encompassing NFPRHA's membership, was national in scope. In addition, plaintiffs in this case include Mary Moe, an individual indigent woman dependent upon a Title X clinic whose constitutional rights are directly affected by the challenged regulations. The Rust case has no individual women plaintiffs.

For all of the above reasons, respondents respectfully request that the Court grant the writ of certiorari and consolidate this case with Rust v. Sullivan.

Respectfully submitted,

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Date: June 12, 1990

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1929

LOUIS W. SULLIVAN, SECRETARY OF
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Motion to Consolidate with Rust v. Sullivan, Nos. 89-1391/1392 was hand-delivered this 12th day of June, 1990 to Kenneth W. Starr, Solicitor General, U.S. Department of Justice, 10th and Constitution Ave., N.W., Room 5614, Washington, D.C. 20530.

James L. Feldesman

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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COMMONWEALTH OF MASSACHUSETTS, ET AL.

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM IN RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI

On June 11, 1990, the Solicitor General filed a petition for a writ of certiorari in this case, and suggested that the Court hold the petition pending its resolution of Rust v. Sullivan, Nos. 89-1391/1392. Respondents agree that the Court of Appeals' en banc decision in this case conflicts with the Second Circuit's decision in New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), cert. granted sub nom. Rust v. Sullivan, Nos. 89-1391/1392 (May 29, 1990). In light of the Court's grant of a writ of certiorari in Rust, and for the reasons presented

in our Motion to Consolidate filed simultaneously with this Memorandum, respondents believe that the Court should grant the writ of certiorari and order this case consolidated with Rust v. Sullivan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Response to Petition for a Writ of Certiorari was hand-delivered this 12th day of June, 1990 to Kenneth W. Starr, Solicitor General, U.S. Department of Justice, 10th and Constitution Ave., N.W., Room 5614, Washington, D.C. 20530.

James L. Feldesman